2003

Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases

Henry Paul Monaghan
Columbia Law School, monaghan@law.columbia.edu

COLUMBIA LAW REVIEW

VOL. 103 DECEMBER 2003 NO. 8

ARTICLES

SUPREME COURT REVIEW OF STATE-COURT DETERMINATIONS OF STATE LAW IN CONSTITUTIONAL CASES

*Henry Paul Monaghan**

The decision in Bush v. Gore *and particularly Chief Justice Rehnquist's concurring opinion were widely criticized for their unwarranted intrusion upon the "authoritative" status of the Florida Supreme Court in determining the meaning of Florida election law. This Article rejects the merits of that criticism. It proposes the thesis that the Supreme Court has ancillary jurisdiction to review state-court determinations of state law in cases where the Constitution or federal law imposes a duty of fidelity to prior state law (t_1) and the claim is that the state court materially and impermissibly departed from that law at a later point in time (t_2). Using* Bush v. Gore *as a vehicle and building upon an examination of the adequate nonfederal ground doctrine and the implications of the Supremacy Clause, this Article establishes that some Supreme Court reexamination of state-court determinations of state law "antecedent" to the federal claim is not only indisputable, but quite familiar. It goes on to argue for independent judgment, rather than the more familiar "fair support" standard, as the ultimate measure of the Supreme Court's jurisdictional authority to reexamine state law, supporting this normative assertion with extensive evidence from Supreme Court practice since the founding. The Article concludes by suggesting that the distinction between the two standards is important to litigants and should (but may not) be important to the Court because, contrary to critics' claims, in appropriate cases—*Bush v. Gore *among them—independent judgment can serve, rather than undermine, the values of "Our Federalism."*

INTRODUCTION

Bush v. Gore[1] received a harsh reception from much of the legal academy.[2] A January 13, 2001, full page advertisement in the *New York Times*

* Harlan Fiske Stone Professor of Constitutional Law, Columbia University. This Article is dedicated to the memory of my colleague Herbert Wechsler, master scholar and master teacher, who with his customary acuteness quite plainly saw it all. Thanks to many; special thanks to Brad Meissner and Stuart Naifeh. By way of full disclosure, the writer voted (as always) for his fellow Democrats, Messrs. Gore and Lieberman.

1. 531 U.S. 98 (2000).

2. "*Bush v. Gore* provoked from the legal academy a response that was without precedent. Never before had a decision of the Supreme Court been subjected by large numbers of law professors to such swift, intense, and uncompromising denunciation in the

signed by 554 "Law Professors for the Rule of Law" charged (in large boldface) that "By Stopping the Vote Count in Florida, The U.S. Supreme Court Used Its Power To Act as Political Partisans, Not Judges of a Court of Law."[3] Their stirring peroration stated:

> By taking power from the voters, the Supreme Court has tarnished its own legitimacy. As teachers whose lives have been dedicated to the rule of law, we protest.[4]

Shortly thereafter, Professor Ackerman, also expressing "rule of law" distress, announced his "reluctant[ ]" conclusion that halting the Florida recount was "a blatantly partisan act, without any legal basis whatsoever."[5] And once again exhibiting his characteristic flair for understatement, Professor Dershowitz stated that the Court's decision "may be ranked as the single most corrupt decision in Supreme Court history."[6]

---

popular press . . . ." Peter Berkowitz & Benjamin Wittes, The Professors and *Bush v. Gore*, Wilson Q., Autumn 2001, at 76, 78. For a more inclusive survey of academic criticism, see Louise Weinberg, When Courts Decide Elections: The Constitutionality of *Bush v. Gore*, 82 B.U. L. Rev. 609, 612–18 (2002).

3. Advertisement, 554 Law Professors Say, N.Y. Times, Jan. 13, 2001, at A7 [hereinafter 554 Law Professors Say]. "The number of subscribers eventually reached 673, from 137 law schools." Jesse H. Choper, Why the Supreme Court Should Not Have Decided the Presidential Election of 2000, 18 Const. Comment. 335, 351 n.62 (2001).

4. 554 Law Professors Say, supra note 3. The law professors never explained why they were especially aggrieved by the Court's alleged misconduct. "[I]f you were going to find an act of betrayal on the Court's part it would have to be a betrayal of the country, in no special way a betrayal of the law professoriate." Frank I. Michelman, Tushnet's Realism, Tushnet's Liberalism, 90 Geo. L.J. 199, 213 (2001).

5. Bruce Ackerman, The Court Packs Itself, Am. Prospect, Feb. 12, 2001, at 42, 48. Professor Ackerman suffered "rule of law" distress because his "entire academic career . . . has been one long struggle against the slogan that law is just politics." Id. Professor Ackerman went on to argue that the majority's conduct was designed to perpetuate its own conservative constitutional philosophy. Accordingly, he insisted that the Senate should not confirm any of President Bush's nominees to the Court. Id. For other examples of ad hominem criticism, see Berkowitz & Wittes, supra note 2, at 79–80. The "self perpetuation" criticism is echoed even by non-conspiracy critics. See, e.g., Choper, supra note 3, at 346–47 & n.45; Paul D. Carrington & H. Jefferson Powell, The Right to Self-Government After Bush v. Gore 2 (Duke Univ. Sch. of Law, Pub. L. & Legal Theory Working Paper Series, Working Paper No. 26, Dec. 2001), available at http://www.law.duke.edu/pub/selfgov/ (on file with the *Columbia Law Review*).

6. Alan M. Dershowitz, Supreme Injustice: How the High Court Hijacked Election 2000 174 (2001). He added: "It is the uniquely corrupt nature of the decision . . . that explains the extraordinary vituperativeness of the language employed by so many usually cautious critics of the high court." Id. This book, which quickly made the *New York Times* best-seller list, is now available in a paperback edition. The "book" strikes this reader as a much padded article. Professor Dershowitz's fundamental claim, like that of many other critics, is that the result would have been different if the case were *Gore v. Bush*. (Does that indictment imply that the four dissenters would then have voted to halt the recount?) His evidence, endorsed by other critics, e.g., Choper, supra note 3, at 348–52, is that the majority acted out of character. The majority Justices generally strongly defend state prerogatives. In this case, Dershowitz said, consistency required deference to the Florida Supreme Court. Dershowitz, supra, at 95–120.

Professor Dershowitz's animating premise is his claim that the current Court has shown an inexorable commitment to the vindication of state prerogatives. See in

A subsequent, and sometimes only slightly less angry, wave of criticism presented *Bush v. Gore* as the showcase for a much larger (and to those commentators regrettable) transformative change: the rise of "judicial supremacy" (a term of splendidly indefinite content). The decision, wrote Professor Kramer, is "surely the capstone of the Rehnquist Court's campaign to control all things constitutional."[7] Professor Tribe instructs us that the decision provides "an unusually clear window into much that is lamentable about how [the majority justices] discharge their role: with utter disdain for democracy and its pluralistic institutions and with eyes fixed firmly on surface appearances rather than underlying realities."[8] "The Court's self-confidence in matters constitutional," he adds, "is matched only by its disdain for . . . other actors in constitutional debate."[9]

---

particular his second and fourth chapters, id. at 55–94, 121–72. This is surely contestable. See, e.g., Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429, 434 (2002) (noting, as one example, that "[w]hen federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates"). Moreover, Professor Pildes contends that the lineup of the Justices in *Bush v. Gore* generally coincides with their positions in prior election law cases. Richard H. Pildes, Democracy and Disorder, 68 U. Chi. L. Rev. 695, 696 (2001). See also the splendid article by Daniel J. Meltzer, The Supreme Court's Judicial Passivity, 2002 Sup. Ct. Rev. 343. This wide-ranging article, essentially an attack on "textualism," contains an extensive review of the Court's recent preemption cases and the literature they spawned. His conclusion: When the Court sees no serious issue of congressional power, the Court, especially the *Bush v. Gore* majority, readily finds federal preemption and in the process ignores textualism. Id. at 362–78.

7. Larry D. Kramer, The Supreme Court, 2000 Term—Foreword: We the Court, 115 Harv. L. Rev. 5, 153 (2001); see also Linda Greenhouse, Learning to Live with *Bush v. Gore*, 4 Green Bag 2d 381, 388–89 (2001). "[*Bush v. Gore*] reflects a chronic and growing disrespect for the institutions of self-government." Carrington & Powell, supra note 5, at 2–3. Most of the underpinning for this understanding of *Bush v. Gore* stems from the Court's decisions rejecting congressional "interpretations" of the Fourteenth Amendment. Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943, 2030 (2003) (advocating policentric rather than juricentric constitutional interpretation, thereby allowing Congress "to respond to changes in constitutional culture"); see also Michael Dorf & Barry Freidman, Shared Constitutional Construction, 2000 Sup. Ct. Rev. 61, 64–65 (arguing, as the title suggests, for a role for Congress in the interpretation of the Constitution, but acknowledging that once the Supreme Court has interpreted the Constitution, there exists a "constitutional common law" that the Court will not allow Congress to overrule); Michael W. McConnell, The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 171–73, 185–88 (1997) (discussing various views of congressional power under section 5 and concluding that the Court should have upheld the Religious Freedom and Restoration Act in *Boerne*).

8. Laurence H. Tribe, The Supreme Court, 2000 Term—Comment: *Erog v. Hsub* and Its Disguises: Freeing *Bush v. Gore* from Its Hall of Mirrors, 115 Harv. L. Rev. 172, 172 n.† (2001). Interestingly, as noted, Professor Tribe's colleague Professor Dershowitz charged the majority with acting out of, not in, character. See supra note 6.

9. Tribe, supra note 8, at 288. Professor Tribe played a prominent role in this litigation, and he acknowledges that the decision made a strong personal impact. Id. at 301–02.

What at least in part unites these disparate criticisms is their intense and time-bound focus on the decision itself, or more generally, on its "misbehaving" sponsor, the "Rehnquist Court." Similar foci, more or less, pervade the analyses of those who assert that the Court felt impelled to act as it did to save the nation from grave political turmoil;[10] that the Court wrongly concluded that a Fourteenth Amendment violation had been established;[11] that the decision not to remand was unjustifiable;[12] and, of course, the claim that resolution of the election's legal issues was the prerogative of Congress, not the Court.[13] To the extent that some of *Bush v. Gore*'s critics hoped to undermine the "legitimacy" of Mr. Bush's presidency,[14] they achieved little lasting success.[15] "[U]nlike law professors, political figures, and a few similarly minded persons, most Americans have a short memory for such events."[16]

Bush v. Gore also raised a less transient but a less explored issue: the scope of the Court's appellate jurisdiction to review state-court determi-

---

10. E.g., Richard A. Posner, Breaking the Deadlock 162–63 (2001); Michelman, supra note 4, at 202–03. Others share the view that the Court sought to act in a "statesman-like manner." See Choper, supra note 3, at 353–55 (collecting additional sources).

11. Bush v. Gore, 531 U.S. 98, 110 (2000); see also infra notes 38–39 and accompanying text.

12. Bush v. Gore, 531 U.S. at 123–24 (Stevens, J., dissenting); id. at 129 (Souter, J., dissenting); id. at 135–43 (Ginsburg, J., dissenting); id. at 144–46 (Breyer, J., dissenting).

13. Justice Breyer, joined by Justice Ginsburg, argued this point. Id. at 152–58 (Breyer, J., dissenting). Many commentators agreed. See, e.g., Choper, supra note 3, at 342–45. My colleague Samuel Issacharoff observes, "[I]t was, after all, a partisan election that was at stake. It hardly seems an affront to democratic self-governance to channel the ultimate resolution of a true electoral deadlock into other democratically-elected branches of government." Samuel Issacharoff, Political Judgments, *in* The Vote: Bush, Gore and the Supreme Court 55, 73 (Cass R. Sunstein & Richard A. Epstein eds., 2001). Echoing Justice Breyer, Professor Issacharoff noted that "Congress, being a political body, expresses the people's will far more accurately then does an unelected court. And the people's will is what elections are all about." Id. (internal quotation marks omitted) (quoting Bush v. Gore, 531 U.S. at 155 (Breyer, J., dissenting)); see also Weinberg, supra note 2, at 664 ("The Court should not intervene in an election in such a way as to take it away from the electorate, or while the statutory process has yet to run its course."). But see Vasan Kesavan, Is the Electoral Count Act Unconstitutional?, 80 N.C. L. Rev. 1653, 1659–61 (2002). Professor Kesavan's article is a lengthy textual and historical analysis arguing that 3 U.S.C. § 15 (2000), which sets forth the rules for counting and not counting electoral votes, has no constitutional basis. Article II, Section 1, Clause 3, he argues, confers a purely ministerial counting power on Congress. Id.

14. See the collection of essays in *Bush v. Gore*: The Question of Legitimacy (Bruce Ackerman ed., 2002). Almost all of the essayists (for example, Ackerman, Balkin, Guido Calabresi, Post, Rubenfeld, and Tribe) challenge the legitimacy of the Court's decision. Cf. Robert Pushaw, Politics, Ideology, and the Academic Assault on *Bush v. Gore*, 2 Election L.J. 97, 98–101 (2003) (book review). Professor Pushaw is sharply critical of the essays. Id.

15. See Choper, supra note 3, at 352–57.

16. Id. at 356. On the other hand, polls indicate that many of those polled in 2003 still believed that Mr. Bush was not legitimately elected. Adam Nagourney, Guns, Butter and Hope; Listen Up, Democrats: Why 2004 Isn't 1992, N.Y. Times, May 4, 2003, at 3 (Week in Review).

nations of state law in cases involving constitutional claims.[17] From beginning to end, a widespread perception existed that the Court, and particularly Chief Justice Rehnquist's concurrence, had intruded far too deeply upon the "authoritative" status of the Florida Supreme Court in determining the meaning of the Florida election law. "Here the U.S. Supreme Court appeared to be second-guessing the Florida court on a question of state law, a federal intrusion upon state autonomy more drastic than any of the congressional intrusions nullified by the Court in [its recent] decisions . . . ."[18] This Article examines—and rejects—the merits of that complaint.[19]

---

17. The jurisdictional question has received far less attention than the majority's determination on the merits.

> Most scholars have minimized the *Bush v. Gore* concurrence's jurisdictional puzzle—that is, what might have given the Court power to reverse the Florida court's state-law judgment despite its own limited jurisdiction to review only federal questions?—and have treated the case as raising primarily *merits* concerns. These scholars solve jurisdiction by characterizing the concurrence as raising the federal question of whether the state court's reading of state law violated Article II or a federal statute.

Laura S. Fitzgerald, Suspecting the States: Supreme Court Review of State-Court State-Law Judgments, 101 Mich. L. Rev. 80, 85–86 n.22 (2002).

18. Frank Goodman, *Preface* to Annals Am. Acad. Pol. & Soc. Sci., March 2001, at 9, 14 (referring to the Court's "safe harbor" ruling). Professor Goodman's remarks were made in reference to the Court's December 12 "safe harbor" ruling, discussed infra Part I. See also Erwin Chemerinsky, *Bush v. Gore* Was Not Justiciable, 76 Notre Dame L. Rev. 1093, 1111 (2001) (arguing that the Court should have declined to take the case, but that, in any event, "[t]he Supreme Court impermissibly usurped the Florida Supreme Court's authority to decide Florida law in this extraordinary case"); Steven G. Gey, The Odd Consequences of Taking *Bush v. Gore* Seriously, 29 Fla. St. U. L. Rev. 1005, 1023 (2001) (stating that "the *Bush v. Gore* concurring Justices' attempt to become the definitive arbiters of Florida election law is weak and poorly supported"); Harold J. Krent, Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in *Bush v. Gore*, 29 Fla. St. U. L. Rev. 493, 496 (2001) ("The [concurring] Justices' willingness in *Bush v. Gore* to hold that the state court interpretation of state law changed Florida's law flies in the face of the Court's reticence to examine state court decisions closely, even in the contexts in which federal rights undeniably are at stake."); David A. Strauss, *Bush v. Gore*: What Were They Thinking?, 68 U. Chi. L. Rev. 737, 753 (2001) (noting that, while the Florida Supreme Court's interpretation of the contest statute was not necessarily correct, "the fact that [it] was consistent with the plain language of the . . . statute should be enough to show that that court was not acting in a fundamentally illegitimate way that warranted the United States Supreme Court's determined effort to derail it"); Cass R. Sunstein, Order Without Law, 68 U. Chi. L. Rev. 757, 763 n.30 (2001) ("To be sure, a decision by a state court to disregard state law would raise serious questions under Article II. . . . But the [Florida Supreme Court] majority's view was not so implausible as to amount to a change, rather than an interpretation."). This point was, of course, the principal theme of the dissenting opinion of Justice Ginsburg. Bush v. Gore, 531 U.S. at 135–43 (Ginsburg, J., dissenting).

19. Inquiry into this topic has begun, but on a still rather limited scale. See, e.g., Krent, supra note 18, at 511–33 (probing and exploring the significance of the materials relied upon by the Chief Justice); Michael E. Solimine, Supreme Court Monitoring of State Courts in the Twenty-First Century, 35 Ind. L. Rev. 335, 336 (2002) (indicating that *Bush v. Gore*'s "aggressive review" may foreshadow a new role for the Supreme Court in

The complaint was, however, understandable. Prior to *Bush v. Gore*, three fundamental and interrelated principles had informed the settled understanding of the Court's appellate authority over the judgments of the state courts. First, the "system of appellate jurisprudence [initially established by the twenty-fifth section of the act of 1789]. . . . has been based upon the fundamental principle that [the Supreme Court's] jurisdiction was limited to the correction of errors relating solely to Federal law."[20] Second, a state court judgment resting upon an "adequate and independent" nonfederal ground precludes Supreme Court "jurisdiction" to review even the erroneously determined *federal* issues in the case: "[O]ur power is to correct wrong judgments, not to revise opinions."[21] Third, and of most significance here, the Court is generally "bound to accept the interpretation of [the State's] law by the highest court of the State."[22]

The scope of this last proposition, which played a powerful role in the *Bush v. Gore* dissents, especially that of Justice Ginsburg,[23] is this Article's subject. *Bush v. Gore* in fact muddied a deeply embedded understanding that state-court determinations of state law in federal cases are open to *some* reexamination by the Supreme Court: certainly so when, in Herbert Wechsler's language, the "existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law. Because of that relationship the state court does not speak the final word on the state question . . . ."[24] Over the course of time, however, the scope of that review has increasingly been assumed to

---

interpreting state court cases); Michael Wells, Were There Adequate State Grounds in *Bush v. Gore*?, 18 Const. Comment. 403, 405 (2001) (arguing that Article II served as a federal constraint on the authoritativeness of the Florida court's state law determinations and that, consequently, the Supreme Court owed no deference to the state court's determinations). The most comprehensive and provocative analysis is by Professor Fitzgerald. See Fitzgerald, supra note 17 (articulating a strongly elaborated defense of the position, rejected in this Article, that the Supreme Court possesses an exceedingly narrow jurisdictional authority to review state-court state-law determinations only to prevent clearly proven evasion of the commands of federal law). For other references, see id. at 85 n.20.

20. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630 (1874); see also Fitzgerald, supra note 17, at 82 n.9 (collecting authorities).

21. Herb v. Pitcairn, 324 U.S. 117, 126 (1945). "If in fact the judgment rests on a state ground, the Supreme Court has no jurisdiction to review the case." Robert L. Stern et al., Supreme Court Practice § 3.22, at 195 (8th ed. 2002).

22. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976), quoted with approval in Alabama v. Shelton, 535 U.S. 654, 674 (2002). Thus, last term in *Ring v. Arizona*, involving the state law allocation of functions between judge and jury, the Court without the slightest embarrassment abandoned its prior construction of an Arizona death penalty law on the basis of a subsequent state supreme court opinion stating that the Court's initial understanding was in error: "[W]e recogniz[e] that the Arizona court's construction of the State's own law is authoritative . . . ." 536 U.S. 584, 603 (2002).

23. 531 U.S. at 135–43 (Ginsburg, J., dissenting).

24. Herbert Wechsler, The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review, 34 Wash. & Lee L. Rev. 1043, 1054 (1977) [hereinafter Wechsler, Appellate Jurisdiction].

be quite narrow: When a nonfederal ground is asserted, "it is the province of this Court to inquire [only] whether the decision of the state court rests upon a fair or substantial basis,"[25] a standard known as the "fair support" rule. The "only" is my insertion, one designed to underscore the presumably limited nature of the Court's jurisdictional authority.

In an earlier article, I argued that, on direct review of state court decisions, the Court in constitutional cases could (but was not constitutionally compelled to) review de novo not only all issues of federal law, but also of constitutional law application and (save to the extent limited by due process and the Seventh Amendment) of adjudicative fact bearing on the constitutional claim.[26] I believe that a similar "ancillary" jurisdictional authority exists whenever the applicable federal constitutional provision directly constrains or incorporates state law. This jurisdiction most clearly exists when the federal petitioner asserts that the applicable constitutional provision imposes a duty of fidelity to state law at a given point in time in the past (t_1), and the petitioner claims that at some later point in time (t_2) that duty was materially and impermissibly breached.[27] The breach of the duty of fidelity at t_2 may be the result of subsequent legislation or adjudication. The Court can, of course, determine for itself whether a "material" departure has occurred at t_2, and, if so, whether the departure is a constitutionally impermissible one.[28] These are pure questions of the meaning of the applicable constitutional provision. I submit, however, that our constitutional practice also shows that the Court has ancillary jurisdiction to review de novo the state court's determination of

---

25. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944).

26. Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 238–39 (1985) [hereinafter Monaghan, Fact]. This analysis assumed, of course, that no adequate nonfederal ground existed to bar review.

27. This context may in fact include nearly all the decisions. When the only issue is whether the rule of law announced by the state court abridges federal constitutional guarantees, the state court's determination of state law is seldom challenged. But there are exceptions. See, for example, U.S. Mortgage Co. v. Matthews, 293 U.S. 232, 236–37 (1934), in which the state court held that a contract obligation existed and had been impaired by state legislation. The Supreme Court reversed, but on the ground that no contract obligation had existed under state law. Id.; see also Mun. Investors Ass'n v. Birmingham, 316 U.S. 153, 157–58 (1942) (state court assumes the existence of contract obligation; Supreme Court finds no such obligation); id. at 157 (finding that the Court was required "to determine for itself the basic assumptions upon which interpretations of the Federal Constitution rests"). Cases such as *Matthews* are criticized in Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 509 (5th ed. 2003) [hereinafter Hart & Wechsler] (citing Henry Paul Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 436 n.201 (1977) [hereinafter Monaghan, Liberty]).

28. As the Contract Clause cases, for example, demonstrate, there may indeed be a departure from the law at t_1, yet that departure may not be constitutionally impermissible. See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 438–48 (1934) (holding that, while a state statute retrospectively changed the obligations of a mortgage contract, such a departure from established law was permissible in the emergency situation created by the depression).

what the state law was at t_1. If I am correct, "fair support" or deference review is a rule of judicial self governance, a sensible and important one to be sure, and one that in our times should mark the ordinary measure of the Court's appellate review.[29] But it is not the ultimate measure of the Court's jurisdictional authority, and in appropriate circumstances, more searching review is permissible. Thus, in *Bush v. Gore*, the Chief Justice's opinion could have been framed as follows:

> The claim before us is that the conduct of the Florida Supreme Court has violated Article II, Section 1, Clause 2 of the Constitution, which we have interpreted to prohibit what amounts to material judicial departures from the electoral framework enacted by the Florida legislature. Ordinarily, we would accept the determination of the Florida Supreme Court on the meaning of the Florida statutory enactment so long as it had fair or substantial support in state law. We need not inquire whether that standard is satisfied here because it is a rule of practice only, not one of our ultimate appellate jurisdiction. Whenever the petitioner asserting a federal right or immunity claims that the Constitution requires fidelity to state law at a given point in time, we have, of course, authority to determine whether there has been a material and impermissible departure from that law. More importantly here, we have ancillary jurisdiction to examine the legal materials properly before the state supreme court to make an independent determination of what the prior state law was in order to ensure full enforcement of the constitutional command. [Citations omitted.][30] We believe that such review is appropriate here. If, as we have concluded, the validity of the election of the President of the United States presents a legal (not a political) question as to whether Article II has been violated, that legal issue should be fully examined and resolved by this Court, not by a court of one of the fifty states. We have examined the majority opinion of the Florida Supreme Court with care and with respect. For the reasons stated below, our conclusion differs from that court's.

So framed, such an opinion would have avoided the needless humiliation of the Florida Supreme Court.[31] More importantly, it would have had a stronger legal and jurisprudential foundation, and for that reason, it

---

29. On the issue of Supreme Court "discretion" (as opposed to "duty") in this area, see infra Part III.A.

30. Despite his well-known distaste for academic commentary, the Chief Justice would cite here with great prescience Monaghan, forthcoming, the then as yet unconceived of article by this author. This is, after all, my imaginary opinion.

31. I presented an earlier draft of this paper (with much profit) at the University of Miami Law School. Several attendees who knew many or all the judges of the Florida Supreme Court expressed considerable unhappiness with what they viewed as the unjustifiable humiliation of those judges.

would have posed problems for the dissenting justices and the chorus of critics who joined them.[32]

This Article's examination of the Supreme Court's power to review state-court determinations of state law in constitutional cases proceeds as follows. Part I sets the issues in sharper relief with a brief review of *Bush v. Gore*, placing particular emphasis on the concurring opinion of Chief Justice Rehnquist and the dissenting opinion of Justice Ginsburg. Part II examines the existing framework of the Court's appellate jurisdictional authority over state courts in an effort to sketch the contours of its power to review state-court state-law determinations. Part II.A shows that the Court's *Marbury*-based prerogative to "say what the [constitutional] law is"[33] clearly includes not only evident constructions of the constitutional text (e.g., "the constitution forbids racial classifications absent a compelling state interest") but also threshold issues of the "characterization" of the state law for constitutional (and, in most cases, federal statutory) purposes. Although there seems to have been some confusion on the point, questions of characterization do *not* involve Supreme Court redetermination of state law. Part II.B sets the issue of the Court's authority to review state-court determinations of state law in its familiar setting of the adequate nonfederal ground doctrine. It shows that the propriety of some such review is incontrovertible. Part III is the normative heart of the Article. Operating from the premise of the supremacy of valid federal law, Part III.A argues for independent judgment rather than deference ("fair support") review as the *ultimate* measure of the Court's ancillary jurisdiction to determine for itself what the state law was at a given point in time (t_1) whenever the Constitution makes fidelity to state law at t_1 a matter of constitutional importance. Part III.B demonstrates that this view in fact finds solid support in the Court's practice, providing numerous historical examples of the independent judgment rule, drawn from such diverse areas as the early treaty cases, Contract Clause cases, and decisions discussing the adequate nonfederal ground doctrine. The Article concludes with a claim that the distinctions set out in this Article necessarily matter to lawyers and they should (but may not) matter to the Justices.

---

32. While defending the Florida court's 4-3 majority against a charge of unreasonable interpretation, Justice Souter acknowledged that "other interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority." Bush v. Gore, 531 U.S. 98, 131 (2000) (Souter, J., dissenting). Justice Ginsburg made a similar concession. Id. at 136 (Ginsburg, J., dissenting), quoted infra note 60. Such concessions would have caused considerable difficulty had the concurrence argued for independent judgment as the proper scope of review. See, e.g., Wells, supra note 19, at 405 (noting that Chief Justice Rehnquist's misstatement of the appropriate standard of review lent power to the dissent's criticisms).

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

1. Illustrating the Problem: A Brief Look at *Bush v. Gore*

Article II, Section 1, Clause 2 provides that "Each State shall appoint, *in such Manner as the Legislature thereof may direct*," electors for president and vice-president.[34] The unanimous per curiam opinion in *Bush v. Palm Beach County Canvassing Board*[35] masked deep differences about the meaning of the italicized language that subsequently surfaced in *Bush v. Gore*. Both the Court and the concurrence believed that Article II conferred upon the state *legislature* a plenary and free standing authority in presidential elections, subject only to federal constitutional (and perhaps valid federal statutory) constraints.[36] Under the "Independent State Legislature doctrine," no room existed, therefore, for judicially fashioned "add ons" drawn from other sources of state law or, of more importance here, for judicial "rewriting" of legislative enactments under the guise of statutory "interpretation."[37]

Nonetheless, for the Court, a five-person majority, the scope of the Court's authority to redetermine the content of Florida election law played no perceptible role. The Fourteenth Amendment occupied center stage.[38] "Seven Justices of the Court agree that there are constitutional [i.e., Fourteenth Amendment] problems with the [manual] recount ordered by the Florida Supreme Court [to determine voter intent]

---

34. U.S. Const. art. II, § 1, cl. 2 (emphasis added). In full, the provision provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." Id.

35. 531 U.S. 70 (2000).

36. Bush v. Gore, 531 U.S. at 104 (citing McPherson v. Blacker, 146 U.S. 1, 35 (1892)); id. at 113 (Rehnquist, C.J., concurring). This could have been understood to have been the view of the entire Court in *Bush v. Palm Beach County Canvassing Board*. There, the Court remanded, inter alia, to determine "the extent to which the Florida Supreme Court saw the [suffrage provisions of the] Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2." 531 U.S. at 78. The suggestion—but in the end a suggestion only—was that any invocation of the Florida Constitution might violate Article II, "even if the [state] courts are seeking to accommodate the legislative scheme to state constitutional provisions." Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 66 (Supp. 2002). For an extended historical account, see Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, 29 Fla. St. U. L. Rev. 731 (2001).

37. Interestingly, however, in *Branch v. Smith*, the Court went out of its way to vacate an alternative holding of the district court that Article I, Section 4, Clause 1's reference to "Legislature" precluded state courts from formulating redistricting plans when the state legislature failed to do so. 123 S. Ct. 1429, 1437 (2003). For an illuminating effort to make sense out of the various appearances of the "Independent State Legislature doctrine" in American constitutional law, see generally Saul Zipkin, Note, Judicial Redistricting and the Article I State Legislature, 103 Colum. L. Rev. 350 (2003).

38. The majority began from the premise that if the state legislature exercised its appointment power by authorizing citizens to vote, citizens had a fundamental right under the Equal Protection Clause. 531 U.S. at 104–05 (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)); see Robert J. Pushaw, Jr., *Bush v. Gore*: Looking at *Baker v. Carr* in a Conservative Mirror, 18 Const. Comment. 359, 382–86 (2001) (locating the outcome of the case in the Court's decision in Baker v. Carr, 369 U.S. 186 (1962)).

that demand a remedy. The only disagreement is as to the remedy."[39] The content of Florida election law entered only at the remedial stage, at the very end of the Court's opinion. And here the Court took Florida election law as it (correctly or not) understood the state court to have declared it, in particular that court's "conclusion" that the Florida Legislature intended to secure the safe harbor benefits of 3 U.S.C. § 5.[40] On that premise, the Court then concluded that the recount must be halted because:

> 1) The state supreme court's "extension" of the manual recount until December 18 constituted an invalid alteration of the electoral framework prescribed by the Florida legislature.
>
> 2) In view of the substantive and procedural infirmities in the Florida manual recount process, it was too late to conduct a constitutionally satisfactory recount by the safe-harbor date of December 12.[41] "That date is upon us, and there is no recount procedure in place . . . that comports with minimal constitutional standards."[42]

---

39. Bush v. Gore, 531 U.S. at 111 (citations omitted). Seven justices concluded that the manual recount violated equal protection because of the different standards being applied to determine voter intent on an inter-county basis. Id. at 104–11; id. at 134–35 (Souter, J., dissenting); id. at 145 (Breyer, J., dissenting). The five members forming the per curiam opinion also found constitutional infirmities even within a single county. Id. at 106. Professor Tribe's effort to detach Justices Souter and Breyer from the Court on the Equal Protection Clause, see Tribe, supra note 8, at 292 n.508, strikes me as quite strained.

40. 531 U.S. at 110. The Court cited a Florida Supreme Court opinion issued only a few hours earlier, which had purported to clarify that court's initial opinion. Whether the Florida court's language in fact supported the Court's characterization of its meaning, and if it did, whether the language should have been treated as dictum because it was uttered in a very different set of circumstances, is a debate I do not enter. For examples of this view, see id. at 143–44 (Ginsburg, J., dissenting); id. at 155 (Breyer, J., dissenting); see also Jack M. Balkin, *Bush v. Gore* and the Boundary Between Law and Politics, 110 Yale L.J. 1407, 1429–31 (2001) (arguing that Florida courts should have been allowed to declare the content of Florida law on the relationship between the benefits of the safe harbor and curing the equal protection violations); Greenhouse, supra note 7, at 387 ("It is far from clear that the Florida court thought it was announcing an authoritative construction of the 3 U.S.C. § 5 question for which the five majority justices cited it."); Tribe, supra note 8, at 187 n.33 ("In hindsight there is strong reason to doubt that, if asked, the Florida Supreme Court would have read the Florida statutes to require the recount to end by December 12."); Weinberg, supra note 2, at 632–33 ("[I]t was senseless for the Supreme Court to assume that the Florida Supreme Court would hold that the election must *never* be resolved if it could not be resolved by [the 'safe harbor' date,] December 12.").

41. The Court said that the counties did not have in place any adequate or consistent mechanism for conducting a valid manual recount. 531 U.S. at 109–10. This was the precise context of its statement that, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." Id. at 109. The context of the statement is ignored by many writers, including, for example, Professor Tribe. See Tribe, supra note 8, at 268–73 (characterizing the Court's language as an attempt to preclude its opinion from "having any precedential value," but failing to note that language's context).

42. 531 U.S. at 110. In Part I of his dissenting opinion, Justice Breyer seemingly agreed that it was too late to rectify the equal protection deficiencies by the safe harbor date, but argued that it was unclear whether a recount could be achieved by December 18,

The first holding entailed no disagreement about the content of state law. The Court merely enforced the constitutional prohibition against any material alteration of the legislative framework for appointing electors, and it took the Florida court's conclusion that the legislature intended to secure the safe harbor as an acknowledgment that such a departure had occurred. The concluding proposition was also based on purely constitutional grounds, predicated upon the Court's finding of an equal protection violation in the manual recount process and upon the Florida court's finding of the Florida legislature's desire to secure the safe harbor.

While almost all academic commentary has centered on the Court's opinion, it is Chief Justice Rehnquist's concurrence[43] and Justice Ginsburg's dissenting opinion[44] that address the subject of this Article.[45] The Chief Justice began from the premise that Article II, Section 1, Clause 2 barred state court "rewrites" of election laws governing presidential elections.[46] While "[i]solated sections of the code may well admit of more than one interpretation, . . . the general coherence of the legislative scheme may not be altered by judicial interpretation . . . ."[47]

The Chief Justice thus necessarily faced the question of what deference, if any, was due to the Florida court's "interpretation" of Florida

---

the date on which the Florida electors would meet to cast their votes. Id. at 146 (Breyer, J., dissenting). Justice Souter also apparently agreed. "To recount these manually would be a tall order . . . ." Id. at 135 (Souter, J., dissenting). If it was in fact too late, Justice Breyer apparently preferred to leave issuance of the formal death certificate to the Florida Supreme Court. Id. at 145–47 (Breyer, J., dissenting). So too did Justice Souter, id. at 135 (Souter, J., dissenting), and Justice Ginsburg, id. at 144 (Ginsburg, J., dissenting).

43. The concurrence was joined by Justices Scalia and Thomas. Id. at 111–22 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., concurring).

44. Id. at 135–44 (Ginsburg, J., dissenting).

45. For an elegant presentation of these aspects of the opinions, see Hart & Wechsler, supra note 27, at 536–40.

46. 531 U.S. at 112–13. This position draws support from McPherson v. Blacker, 146 U.S. 1, 25 (1892), which states that Article II's grant of legislative power "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." The Court went on to add, "This power is conferred upon the legislatures of the States . . . and cannot be taken from them or modified by their State constitutions." Id. at 35. But the argument does not run entirely in one direction. See 531 U.S. at 123–24 (Stevens, J., dissenting) (claiming that Article II's grant implicates acceptance of state legislatures and their state constitutional restraints); id. at 141–42 (Ginsburg, J., dissenting) (arguing that the state should be allowed to organize itself as it sees fit, and thus interpret its laws, without federal disruption). See in particular Zipkin, supra note 37, at 360–63 (arguing that *McPherson* provides a weak foundation for such an important decision on constitutional law). Balkin, supra note 40, at 1413–25, also relies on *McPherson*. He makes the case that state legislative power "is the supreme authority except as limited by the constitution of the State" and undertakes an analysis of the Florida election law. Id. at 1414, 1424 (quoting *McPherson*, 146 U.S. at 25). The reader could on this basis determine whether the Florida court's interpretation was "reasonable or unreasonable." Balkin, supra note 40, at 1424.

47. 531 U.S. at 114 (Rehnquist, C.J., concurring). The Chief Justice viewed this limitation on state law as based on Article II. See Hart & Wechsler, supra note 27, at 536.

electoral law. This was the heart of Justice Ginsburg's dissent, and she cast that issue in deference-saturated terms: "The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to a state high court's interpretations of the State's own law."[48] While "rare" occasions existed in which the Court might go further when faced with clear state court "recalcitrance,"[49] she insisted that "[r]arely has this Court rejected outright an interpretation of state law by a state high court."[50]

Justice Ginsburg's opinion can be read to point in more than one direction.[51] Whatever she meant, however, her emphasis on deference clearly put the Chief Justice on the defensive. He began with important general concessions:

> In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. . . . Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law . . . .[52]

He then sought to escape from the consequences of his concessions:

---

48. 531 U.S. at 142 (Ginsburg, J., dissenting).

49. "[T]here are cases in which the proper application of federal law may hinge on interpretations of state law . . . [and thus] this Court must sometimes examine state law in order to protect federal rights." Id. at 137. But such authority exists only in "rare" circumstances. Id. at 139–40.

50. Id. at 139 (Ginsburg, J., dissenting). Justice Ginsburg added:

> The Chief Justice's casual citation of [three] cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold.

Id. at 140. For her, deference is required absent "the kind of recalcitrance by a state high court that warrants extraordinary action by this Court." Id. at 139–41. Shortly thereafter, however, Justice Ginsburg joined the Court's opinion in Rogers v. Tennessee, 532 U.S. 451 (2001), discussed infra text accompanying notes 311–317, which undertook a rather extensive review of state law in the context of a Fourteenth Amendment due process challenge. And she wrote the majority opinion in Lee v. Kemna, 534 U.S. 362 (2002), discussed infra text accompanying notes 321–323, closely examining and ultimately disregarding a state procedural rule relied upon by a state intermediate appeals court on the ground that, the appellate court's opinion notwithstanding, no published state court opinion had required "flawless" compliance with the state procedural rules and that the circumstances of this case were "unique." Id. at 382–83.

51. Justice Ginsburg could be understood to say either that (a) the state court's determinations of state law must be accepted, except in rare circumstances, or (b) only "reasonable" state-court determinations must be thus accepted. The former position would contradict considerable judicial authority, including decisions upon which she relied. 531 U.S. at 136–38 (Ginsburg, J., dissenting). The latter formulation seems most probably intended, particularly since Justice Ginsburg joined the opinions of Justices Souter and Breyer which defended the Florida Supreme Court against a charge of unreasonableness. Id. at 130–33 (Souter, J., dissenting); id. at 147–52 (Breyer, J., dissenting).

52. Id. at 112.

> But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that '[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct,' electors for President and Vice President. *Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance. . . .*
>
> . . . .
>
> . . . Though we generally defer to state courts on the interpretation of state law, . . . there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.[53]

The Chief Justice's special emphasis on the importance of the role constitutionally assigned to state "Legislatures" (i.e., at t_1) to justify separation of the constitutional text from its judicial "interpretation" is unconvincing. In fact, that separation permeates much constitutional law theorizing; for example, the distinction is regularly invoked to minimize the role of stare decisis in constitutional adjudication.[54] More importantly here, how the posited distinction bears upon the scope of the Court's appellate jurisdiction is decidedly unclear. The Chief Justice's response that to "attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II" is question begging.[55] The crucial issue remains: What is the Court's "responsibility" once the supreme court of the state has spoken? The posited distinction, moreover, finds no support whatsoever in the randomly scattered judicial authorities also invoked by the Chief Justice.[56] Most important for me, however, is the Chief Justice's implicit concession that Supreme Court "deference" is displaced only because of the special structure of Article II. This, I hope to show, would be a significant narrowing of our constitutional tradition.

---

53. Id. at 112–14 (second emphasis added) (citations omitted). Compare the Chief Justice's dissent in Bunkley v. Florida, 123 S. Ct. 2020, 2024–26 (2003) (Rehnquist, C.J., dissenting). Recognizing that petitioner "presents strong arguments" for his claim that what the state supreme court characterized as an "evolutionary" change in its law was in fact also the law at the time of his conviction, the Chief Justice said, "But the Florida Supreme Court concluded otherwise, and we may not revisit that question." Id. at 2024 n.1.

54. See Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 767–70 (1988) (collecting sources). I have criticized the dichotomy in other contexts. Id. at 770–72 ("[I]n the end, the written Constitution argument cannot sustain the absolute primacy of text over gloss.").

55. 531 U.S. at 115. As Justice Ginsburg pointed out, Article II itself does not "license[ ] a departure from the usual deference we give to state-court interpretations of state law." Id. at 141 (Ginsburg, J., dissenting). Justice Breyer made the same point. Id. at 148 (Breyer, J., dissenting).

56. Id. at 114–18 & n.1.

The Chief Justice's opinion becomes even more unsatisfying once it is recognized that, in the end, his "Independent Legislature" grounded separation of the state election-law text from its state-court judicial interpretation does little or no work. After stating that a "*significant departure* from the legislative scheme for appointing Presidential electors presents a federal constitutional question,"[57] the Chief Justice quickly retreats to familiar fair-support review. Under the guise of statutory construction, the Florida Supreme Court had "impermissibly distorted [that law] beyond what a fair reading required, in violation of Article II."[58] Some aspects of the Florida Supreme Court's opinion were characterized as "absurd" or "peculiar,"[59] criticisms that resonate "fair support" review.[60] It should, of course, be acknowledged here that even though the Chief Justice's opinion ultimately invokes deference language, it is surely arguable that he was in fact far less deferential to the views of the Florida Supreme Court than his opinion suggests. Be that as it may, much of the language

57. Id. at 113 (emphasis added).

58. Id. at 115. "Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State . . . ." Id. at 113–14; see also id. at 116 ("The legislature has designated the Secretary as the 'chief election officer,' with the responsibility to '[o]btain and maintain uniformity in the application, operation, and interpretation of election laws.'"). The Chief Justice went on to complain that the Florida court had invaded the Secretary's discretion, id. at 118, and rejected her reasonable interpretation of the election laws, id. at 119–20. The alleged departures included altering the legislatively prescribed time tables for protests and contests, emptying certification of real significance, invading the discretion conferred by the Florida legislature on Florida canvassing boards whether to recount ballots after the certification deadline, and redefining the meaning of "legal votes" under Florida election law by requiring the recount of improperly marked ballots. For an excellent presentation of this view, see Joel Edan Friedlander, The Rule of Law at Century's End, 5 Tex. Rev. L. & Pol. 317, 320 (2001) (decrying the state court departures from the terms of the state election law). To the same effect is Gary C. Leedes, The Presidential Election Case: Remembering Safe Harbor Day, 35 U. Rich. L. Rev. 237, 270 (2001).

59. 531 U.S. at 119.

60. Justices Ginsburg, Souter, and Breyer each believed that the Florida Supreme Court's construction of the state electoral law found fair support in Florida law (or, in the language of the Chief Justice, did not amount to a "significant departure"). Justice Souter wrote, "The issue is whether the judgment of the State Supreme Court has displaced the state legislature's provisions for election contests . . . ." Id. at 130 (Souter, J., dissenting). After concluding that some judicial interpretation was necessary, he said: "None of the state court's interpretations is unreasonable to the point of displacing the [state law] legislative enactment quoted." Id. at 131. Next followed his acknowledgment that conclusions other than those reached by the Florida Supreme Court were possible. Id. Justice Ginsburg wrote that "I might join the Chief Justice were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated." Id. at 136 (Ginsburg, J., dissenting). Justice Breyer undertook a vigorous defense of the Florida court, id. at 147–52 (Breyer, J., dissenting), and concludes, "I repeat, where is the 'impermissible' distortion?" Id. at 152 (Breyer, J., dissenting) ("Where's the beef," to recall the famous advertisement). Justice Stevens did not address the issue. Except for Justice Souter's failure to join Justice Stevens's dissent, the four dissenting justices concurred in whole or in part in each other's opinions.

of his opinion suggests he believed that he was applying some form of the "fair support" rule.

Given the hurried and pressure-filled circumstances, the Chief Justice understandably lacked the opportunity to explore whether a more exacting inquiry into state law was permissible. His opinion simply cobbled together the fact of a presidential election, a First Amendment and a vagueness case, and a footnote reference to a taking and a treaty case.[61] No unifying theme is suggested.[62] Nonetheless, assuming his premises (that Article II proscribes significant "interpretive" departures (t_2) from the prior legislatively enacted framework (t_1) and that no "political question" is involved), I believe that our constitutional structure and history show that the Chief Justice was far too hesitant in describing the scope of his court's ultimate jurisdictional authority. When federal law requires that a rule of state law be *previously* established, as the Chief Justice saw the situation based upon his understanding of Article II and the decisions that he cited, it is clearly a federal question whether the state court has impermissibly departed from the prior law.[63] That inquiry, in turn, allows the Court to examine the legal materials properly before the state supreme court to determine what the relevant state law *was* (t_1) or is now (t_2). Moreover, that determination can be made de novo, according to the state court decision only the deference due to its power to persuade.

II. The Framework of the Supreme Court's Appellate Jurisdiction over State Courts

The focus of this Article is on the Supreme Court's authority to examine the state-law legal materials properly before the highest state court in order to determine for itself the content of that law at a given point in time. In order to explore the contours of this authority, it is helpful to examine two background principles that govern the Court's appellate review of state court judgments, namely, "characterization" and the adequate nonfederal ground doctrine. These two concepts are addressed in this part.

Part II.A's focus on "characterization" is an attempt to dispel some confusion. A class of decisions most accurately described as instances of the "characterization" of state law for federal law purposes has attracted some criticism for their supposed intrusion into the proper province of the state courts. In my view, these criticisms are misplaced. Issues of characterization involve straightforward determinations of purely federal law issues; no redetermination of state law is involved, and no deference is justified. Examination of these cases, however, helps illuminate the in-

61. Id. at 114–15.

62. The same criticism cannot be made of Justice Ginsburg's opinion. Her review of the cases, id. at 136–40, is tightly organized around a principle of deference.

63. For an exploration of these issues, see Hart & Wechsler, supra note 27, at 539 n.15.

stances when issues concerning the Court's independent review of state-court state-law determinations are actually presented. Part II.B begins examination of those questions. As seen in Justice Ginsburg's dissent, the Court's authority to review state-court state-law determinations is often viewed as an anomaly, arising (if at all) only in "rare" circumstances. Setting the issue of the Court's authority in the context of the adequate nonfederal ground doctrine, I reject this view. Part II.B demonstrates that some Supreme Court reexamination of state court declarations of state law is not only indisputable, but quite familiar.

A. *The Importance of the Threshold Question of Characterization*

In *Bush v. Gore*, no one denies that, in engaging in an equal protection analysis, the Court undertook an appropriate discharge of its *Marbury* function "to say what the [constitutional] law is." Disagreement centered upon the merits of the Court's analysis.[64] But there is another, perhaps less understood, dimension to the Court's constitutional law-declaring function: the threshold question of characterizing the significance or meaning of state law for constitutional law purposes. Judgment on that issue is determined pursuant to the application of an independent federal standard, that is, the application of a federal "patterning definition," to borrow the language of my colleague Tom Merrill.[65] Analyti-

64. For example, Professor Sunstein characterizes the Court's equal protection analysis as a "bolt from the blue." Sunstein, supra note 18, at 765; see also Choper, supra note 3, at 337 n.10, 349 n.53 (suggesting minimal equal protection concerns because the impact of recount standards would be random rather than systematically affecting any particular group); Tribe, supra note 8, at 217–19 (arguing that variations in tallying procedures between counties does not justify the Court's equal protection concerns). See generally Mary Anne Case, Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of *Bush v. Gore* as a Chapter in the History of Ideas About Law, 70 U. Chi. L. Rev. 55 (2003) (offering a witty criticism of the Court's general penchant for rules over standards). See also the thoughtful commentary of my colleague Richard Briffault, *Bush v. Gore* as an Equal Protection Case, 29 Fla. St. U. L. Rev. 325 (2001). He argues that the "undervotes" of "[i]mperfectly marked ballots appear to fall into a constitutional grey area. They might be votes and they might not be votes." Id. at 359.

Apparently still in a decided minority, I believe that the Fourteenth Amendment challenge was quite substantial. "[T]he concern was not with county differences, but with [the] standardless discretion [of the county canvassing boards] that would allow discrimination" among candidates. Einer Elhauge, The Lessons of Florida, Pol'y Rev., Dec. 2001/Jan. 2002, at 15, 21. Different standards were being employed in different counties—indeed within the same county—to determine voters' "intent" with respect to a statewide candidate. "A voter's ballot [in a statewide election] must not be weighted differently from those of other voters in the same jurisdiction." Note, Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000, 114 Harv. L. Rev. 2170, 2190–91 (2001) (citations omitted).

65. Thomas Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 893 (2000). The characterization issue often surfaces in the application of a constitutional standard to the facts. The Court regularly engages in *Marbury*-style review when constitutional standards are in the process of development or further refinement, and the Court believes that its application of those standards to the facts will helpfully elucidate the underlying constitutional standard. The Court's endorsement of independent judgment

cally, the Court does not undertake a redetermination of state law; rather, the Court simply provides an explication of its meaning for federal law or

---

in this context clearly appears in numerous recent decisions. See, e.g., Thompson v. Keohane, 516 U.S. 99, 112–16 (1995) (finding that "state-court 'in custody' determinations" are reviewable by federal courts); Miller v. Fenton, 474 U.S. 104, 110–15 (1985) ("[T]he ultimate question whether . . . the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination."). In Ornelas v. United States, 517 U.S. 690 (1996), a Fourth Amendment case involving "probable cause" and "reasonable suspicion," the Court said that the courts of appeals should exercise independent judgment. These two standards "acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." Id. at 697; see Hart & Wechsler, supra note 27, at 579 (arguing that this standard was announced as a matter of sound judicial administration, not constitutional compulsion). For a more recent example, see United States v. Arvizu, 534 U.S. 266, 274–75 (2002) (relying on *Ornelas* to support the Court's de novo review of reasonable suspicion determinations). See generally Monaghan, Fact, supra note 26, at 273–76. I doubt whether, at least in constitutional cases, any meaningful differences exist between the Court's substantive review of cases coming from the lower federal courts and cases properly before the Court that come from the state courts. See *Ornelas*, 517 U.S. at 695–96 (citing earlier federal and state cases interchangeably). In United States v. Drayton, 536 U.S. 194 (2002), both the majority and dissent engaged in both law elaboration and an extended law-application analysis. While *Ornelas* originated in the federal courts, the principal authority discussed was the Court's earlier opinion in a decision on appeal from a state supreme court, Florida v. Bostick, 501 U.S. 429 (1991). In Hernandez v. New York, 500 U.S. 352 (1991), the Court assimilated its review of state court fact finding to its review under Federal Rule of Civil Procedure 52(a). In addition, see Hart & Wechsler, supra note 27, at 580 (noting that "[t]he plurality opinion in [Lilly v. Virginia, 527 U.S. 116 (1999),] appears to treat the question of Supreme Court review of state judgments no differently from the question of federal appellate review in *Ornelas*").

When the Court views the controlling issue before it as simply the straightforward application of constitutional standards correctly stated by the state court, review is seldom granted. Court Rule 10 provides in part, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Even when review is granted, the Court is under no unyielding compulsion to make an independent law-application determination. E.g., Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 176 (1983) ("It will do . . . little good if this Court turns every colorable claim that a state court erred in . . . into a *de novo* adjudication . . . ."), discussed in Monaghan, Fact, supra note 26, at 265–66; see also Hart & Wechsler, supra note 27, at 579. But see id. at 579 n.11 (discussing one case where the Court required court of appeals to engage in de novo review of the constitutionality of a punitive damages award). But neither is the Court under an inexorable duty to eschew law-application determinations. Whether the Florida court impermissibly departed from the federal constitutional requirement that no significant departures exist from the legislatively enacted framework seems to me to be an entirely acceptable exercise of the Court's appellate jurisdiction even if viewed only as a question of law application. Of course, the line between "further definition" of constitutional norms and "law application" can be a thin one; they are almost imperceptible points on a continuum. See Hart & Wechsler, supra note 27, at 578–86. As Justice Holmes long ago said, "most of the distinctions of the law are distinctions of degree." Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting); see also, e.g., Walz v. Tax Comm'n, 397 U.S. 664, 678–79 (1970) (noting that the Court must often make "fine distinctions" between what is and what is not permissible).

constitutional purposes. Characterization, then, is simply the Court's discharge of its *Marbury*-based function of providing constitutional meaning.

Until recently at least, some confusion on this issue has existed, as is apparent from a comparison of the current with the earlier editions of the classic work in the field, *Hart & Wechsler's The Federal Courts and the Federal System.*[66] This Article was prepared while the Fourth Edition, published in 1996, was current. That edition, along with all prior ones, treated some "characterization" cases as problematic because of their apparent assertion of authority to redetermine questions of state law previously decided by state courts. The current edition, published in 2003, rather quietly walks away from that criticism. A need for analytic clarity exists here, if we are to assess accurately the proper scope of the Court's authority to review state law questions on appeal from the highest state court.

What follows are examples of the Court's exercise of *Marbury*-style independent-judgment review whenever the Court understands the issue before it as involving, not what the state law is or was, but its federal significance (i.e., characterization) in light of federal constitutional (and to some extent statutory) commands. These cases highlight the boundary lines of the Court's authority to review state-court state-law determinations.

1. *Contract Clause.* — Albert Beveridge, Marshall's great biographer, provides an admirable account of the escalation of a campus feud to the Supreme Court decision in *Trustees of Dartmouth College v. Woodward.*[67] Senator Beveridge notes that "[t]he principle upon which Marshall finally overthrew the New Hampshire law [i.e., contract impairment] was given a minor place" in the arguments of college counsel before the state supreme court.[68] That court held that, despite its charter, the college's trustees held a position of public trust, "as much so as the office of governor, or of judge of this court."[69] Thus, "how far the legislature possesses a constitutional right to interfere in the concerns of private corporations"

66. Compare Hart & Wechsler, supra note 27, at 528–36 (adopting a view of characterization consistent with my own), with Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 555–63 (4th ed. 1996) [hereinafter Hart & Wechsler, Fourth Edition] (treating cases here denoted by the term "characterization" as problematic). This change in perspective is further explored infra notes 77–78 and accompanying text.

67. 17 U.S. (4 Wheat.) 518 (1819).

68. 4 Albert J. Beveridge, The Life of John Marshall 234 (1919). Indeed, at argument in the Supreme Court, Webster gave little emphasis to the Contract Clause claim even though it was the only issue before the Court. Id. at 240–50.

69. Trs. of Dartmouth Coll. v. Woodward, 1 N.H. 111, 119 (1817).

was not before it.[70] Professor Hill agrees.[71] As he observes, the Court "proceeded to disagree [on the meaning of state law], without indicating why the decision on the issue of state law was thought to be reviewable."[72] So understood, *Dartmouth College* seemingly illustrates the Supreme Court's willingness to determine for itself what the state law was before the allegedly impairing legislation.[73] I understand *Dartmouth College* differently, however. The Court did not differ with the state court on the content of state law; rather, it simply construed the Contract Clause itself, determining the threshold issue that the charter rights constituted a contract for purposes of the constitutional guarantee, whatever the relevance of the state court characterization for other purposes.[74]

General Motors Corp. v. Romein[75] recently reiterated this mode of analysis. In reviewing a state-court determination that no contract had existed (i.e., what the state law *was* at t_1), the Court said, "The question whether a contract was made is a federal question for purposes of Contract Clause analysis, . . . and 'whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment.'"[76]

---

70. Id. at 120. The Contract Clause "was not intended to limit the power of the states" over their officers and civil government. Id. at 132. And even if the royal charter were a contract, it could be modified if "the public interest might require." Id. at 134. Otherwise, "[s]uch a contract, in relation to a public institution would . . . be absurd and repugnant to the principles of all government." Id.

71. Alfred Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 955 n.43 (1965) ("Throughout the case, the question of impairment as such was a relatively minor one.").

72. Id. Professor Hill correctly observes that no claim was made that the state court was seeking to avoid the imperatives of federal law. Id.

73. For a lucid discussion of the nineteenth-century cases interpreting the Contract Clause generally, and state granted franchises particularly, see Stephen A. Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence, 60 S. Cal. L. Rev. 1 (1986); see particularly id. at 66–75. Mr. Siegel asserts that "many jurists concluded that nineteenth century state-granted franchises merited differential treatment from ordinary contracts." fd. at 74.

74. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 626–40 (1819); Beveridge, supra note 68, at 267–72. The Court in effect said:

> We fully accept the New Hampshire supreme court's analysis of the relevant New Hampshire legal materials, and we also accept that court's conclusion that no contract has been created as a matter of state law. As to the meaning of constitutional language, however, we exercise independent judgment "to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Whether, therefore, the interests described by the state court constitute a contract for Contract Clause purposes is a question for independent judgment because it involves the meaning of the word "Contract[ ]" in Article I, Section 10, Clause 1 of the Constitution.

75. 503 U.S. 181 (1992). Interestingly, Justice Ginsburg also cited this as a deference case. Bush v. Gore, 531 U.S. 98, 137 (2000) (Ginsburg, J., dissenting). If so, it is *Skidmore*, not *Chevron*, deference. See infra Part III.B.2.

76. 503 U.S. at 187 (citing Irving Trust Co. v. Day, 314 U.S. 556, 561 (1942), and quoting Appleby v. City of New York, 271 U.S. 364, 380 (1926)). At the same time, however, the Court in *Romein* acknowledged the "great weight" that it accords to—and in

But what exactly is the federal question? Is the existence of a contract simply a matter of state law, or does the characterization of the state law materials involve the meaning of the Impairment Clause itself, with the latter inquiry to be necessarily determined by an independent federal standard? In the Fourth Edition (and all earlier ones), *Hart & Wechsler* expressed discomfort with the latter suggestion: "Isn't it difficult to justify the view that the existence of a contract is governed by federal law?"[77] Although this position has now been abandoned,[78] at first blush, the objection seems troublesome, since it is state law that creates the obligation that the Contract Clause protects.[79] Although the Court's *Marbury*-based[80] law-declaration function requires the exercise of independent judgment, it tells us nothing at all about what law—state or federal—governs the characterization issue. In the Contract Clause context, any answer must be derived from the Contract Clause's origin and line of growth. To my mind, the Founders' considerable concern with protect-

---

the end saw "no reason to disagree with"—the state court's views. Id. (quoting *Appleby*, 271 U.S. at 380).

77. Hart & Wechsler, Fourth Edition, supra note 66, at 556. The authors continue with more specific objections, which still appear in the Fifth Edition:

> Are the federal courts in a position to formulate a complete body of federal contract law for purposes of the Contract Clause? And should the question whether a particular contract creates an obligation be governed by one set of rules (state law) in a suit for breach and by another (federal law) in litigation under the Contract Clause?

Hart & Wechsler, supra note 27, at 529. These specific objections seem to me to lack force. Little reason exists to believe that the Court will be called upon to "formulate a complete body of federal contract law" to deal with a relatively few cases. And the claim that one body of law should govern both breach and impairment cases is not convincing: A specific federal constitutional interest exists in preventing impairment, but none in the resolution of ordinary contract disputes even when the state is a party to the contract—ordinary breach of contract by state officials is not an "impairment."

78. Most significantly, the key sentence quoted in the text now includes the insertion of the word "only" between "governed" and "by." Hart & Wechsler, supra note 27, at 529. Also telling, the authors of the Fifth Edition ask:

> But whose law governs the antecedent question whether there was a contract in the first place? The *Brand* opinion says that "the existence and nature of the contract" claimed to be impaired is a question "primarily of state law." On that view, does it necessarily follow that Supreme Court review of the state court's determination is inappropriate?

Id. at 528–29 (discussing Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938)). This formulation elides the distinction between characterization and redetermination of state law.

79. See *Appleby*, 271 U.S. at 380 ("[The] construction and effect [of the contract] is a state question, and we must determine it from the law of the State."); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 259 (1827) ("[T]he municipal law of the State . . . is emphatically the law of the contract made within the State . . . ."); Robert L. Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 512, 852 (1944) ("Whether a contractual obligation is subject to a particular condition presents a question of state law."). Federal law could, of course, create contractual interests. State court interference with those interests would trigger a preemption analysis.

80. See supra note 65.

ing the stability of contracts against the vicissitudes of subsequent state legislative impairment ill comports with the permissibility of state-court judicial nullification.[81] Moreover, an obvious awkwardness would exist when the Supreme Court instructs a state supreme court that it did not correctly characterize the state-law legal significance of the very state-law interests it had correctly identified. Finally, and for me most decisively, our general constitutional law tradition is that the meaning of constitutional language is to be determined by an independent federal standard. Thus in Contract Clause cases the Court has long asserted the authority to determine what state-law interests are not embraced by the Clause.[82]

2. *Property.* — In the property area, the characterization (or patterning definition) issue first surfaced in the early American legal experience with slavery.[83] Before the Civil War, the national government actively and consistently espoused the position that slaves were "property."[84] For example, Article VII of the Treaty of Peace ending the War of Independence enjoined evacuating British troops from the carrying away of "ne-

---

81. See Benjamin Fletcher Wright, Jr., The Contract Clause of the Constitution 3–18, 58–60 (1938) (discussing the Founders' views of the Contract Clause and early state reservation clauses); see also infra Part III.B.2. This argument is by no means a knockdown one, however. As the language of Article I, Section 10 itself shows, the Framers were concerned with abuses by the state legislatures, not the state courts. See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 290, *passim* (1996).

82. Under current doctrine, a state court cannot enlarge the range of interests embraced by the Contract Clause simply by recognizing an arrangement as a "contract" as a matter of state substantive law. E.g., Garrison v. City of New York, 88 U.S. (21 Wall.) 196, 203 (1874) (finding a judgment of record not to be a contract); see also Paul G. Kauper, What is a "Contract" Under the Contracts Clause of the Federal Constitution, 31 Mich. L. Rev. 187, 193–97 (1932) (reviewing the Court's decisions and arguing that quasi-contractual obligations do not fall within the protection of the clause); Monaghan, Liberty, supra note 27, at 436 n.201 (noting that "some consensual agreements valid under state law are not contracts within art. 1, § 10"). A similar exclusionary development has occurred with respect to state-created liberty interests. See, e.g., Sandin v. Conner, 515 U.S. 472, 483–84 (1995).

83. My colleague Robert Ferguson called to my attention Thomas Jefferson's famous "Fire Bell in the Night" letter of April 22, 1820. Jefferson wrote that "[t]he cession of that kind of property, for so it is misnamed, is a bagatelle which would not cost me a second thought, if, in that way, a general emancipation and *expatriation* could be effected . . . ." Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), *in* 10 The Writings of Thomas Jefferson 157, 157 (Paul Leicester Ford ed., 1892–1899). He added, however, that Congress had no power "to regulate the condition of the different descriptions of men composing a State. This certainly is the exclusive right of every State . . . ." Id. at 158. The treaty cases, discussed infra Part III.B.1, of course illustrate federal protection for state-created property interests. But they did not involve any issue of characterization as the term is used here.

84. In a posthumously published work, *The Slaveholding Republic*, Don Fehrenbacher describes (as he did in another context in his prize-winning book of 1978, *The Dred Scott Case*) the political and legal structure of antebellum slavery. He emphasizes that despite (in his view) the Constitution's neutrality on the subject of slavery, the national government espoused the view of slaves as "property" at every level. Don Fehrenbacher, The Slaveholding Republic (Ward M. McAfee ed., 2001).

groes and other Property,"[85] and judicial decision after judicial decision characterized slaves as property.[86] In the 1828 congressional debates over an indemnity application based upon the military use of private "property" in time of war, the characterization issue came into dramatic focus. During the War of 1812, a "slave named Warrick, who had been impressed into military service, suffered two serious wounds from enemy fire . . . . His owner filed a claim . . . [for] medical expenses, loss of the slave's time while recuperating, and the depreciation of his value as property."[87] Southern representatives and some northerners agreed that compensation was due.[88] But

> [f]or the most part . . . northerners participating in the debate were disposed to contest the absolute claims of southern spokesmen. None among them espoused abolitionist principles, to be sure, and none denied that slaves were property within the jurisdiction of a slaveholding state. Instead, they sought to occupy middle ground by distinguishing state law from federal law where slavery was concerned. That strategy enabled them to reaffirm the security of slavery as a state institution, while at the same time rejecting southern efforts to define the United States unconditionally as a slaveholding republic.[89]

While now a matter of historical interest only,[90] the "Warrick affair" is a quite early illustration of the need in "property," as in contract, cases to distinguish between the interests created by state law and their constitutional law significance. Here, too, the Fourth Edition of *Hart & Wechsler* expressed some discomfort. It acknowledged that there "might . . . be a minimal conception of 'property' in the Due Process Clause beneath which the states cannot (and almost never do) fall."[91] Describing my hy-

---

85. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art. VII, 8 Stat. 80, 83.

86. See Fehrenbacher, supra note 84, at 216–25 (citing cases).

87. Id. at 3.

88. "Edward Everett of Massachusetts, classical scholar and conservative politician, adopted the southern point of view, maintaining that property in slaves was protected by the just compensation clause of the Fifth Amendment." Id. at 5.

89. Id. Professor Fehrenbacher continued:

> The northern argument, though it varied from speaker to speaker, was fairly well summed up in one sentence by John C. Clark of New York. "I am led to the conclusion," he declared, "that slaves, for certain purposes, are persons; that their masters have in them only a qualified property; that Government, in cases of high necessity, growing out of a state of war, has a right to impress them into its military service, without the liability of being justly called on for indemnification." A few northerners pressed the argument to the point of denying that the Constitution contained any recognition of slaves as property.

Id. at 5–6.

90. Article I, Section 9, Clause 4 of the Confederate Constitution, a constitution carefully modeled on the Constitution of the United States, provided that "No . . . law denying or impairing the right of property in negro slaves shall be passed." Confederate Const. art I, § 9, cl. 4, reprinted in Emory M. Thomas, The Confederate Nation appx. at 310, 313 (1979).

91. Hart & Wechsler, Fourth Edition, supra note 66, at 559 n.4.

pothetical that a state could not invest automobile "owners" with all the familiar attributes of ownership existing in other states but deny that it constituted property for takings purposes, the authors state: "That the hypothetical is so extreme . . . indicates how rarely a state definition of property is likely to fall beneath any possible federal threshold."[92] The authors, however, never explained their willingness to accept at least some minimal federal definitional threshold for property, but not for contract.

More importantly, the legal landscape has been dramatically altered since the authors wrote.[93] Citing *College Savings Bank*,[94] Professor Merrill states that "the Court has now endorsed, unequivocally and in a majority opinion, a federal definition of Constitutional property."[95] There, the Court denied that protection against trademark infringement was a property right that Congress could protect under Section 5 of the Fourteenth Amendment because "[t]he hallmark of a protected property interest is the right to exclude others."[96] And just recently, the Court stated that

---

92. Id. at 559 (discussing Monaghan, Liberty, supra note 27, at 440). The Fifth Edition drops discussion of this hypothetical.

93. The existence, vel non, of "property" seldom raised any issue in the first half of the twentieth century. See Monaghan, Liberty, supra note 27, at 435. This is because prior to Board of Regents v. Roth, 408 U.S. 564 (1972), the Court increasingly read "life, liberty and property" as a unitary concept so as to include the full range of state conduct having serious impact upon important individual interests. Monaghan, Liberty, supra note 27, at 406–08. For example, in Flemming v. Nestor, 363 U.S. 603 (1960), a case involving the termination of welfare benefits, the Court first denied that the individual interests in the program constituted "accrued property rights," but it then held that they were "of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." Id. at 610–11 (internal quotation marks omitted).

94. Coll. Sav. Bank v. Fla. Prepaid Educ. Expense Bd., 527 U.S. 666 (1999).

95. Merrill, supra note 65, at 911. Like the editors of the Fifth Edition, I would date the development earlier with Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164–65 (1980) (holding that interest accruing on interpleader fund is depositors' property). See Hart & Wechsler, supra note 27, at 532; see also Brown v. Legal Found., 123 S. Ct. 1406, 1419 (2003) (holding that interest accruing on funds deposited in lawyers' trust accounts and designated for low-income legal aid is property of client). Professor Merrill believes that the Court has endorsed three different conceptions of property for constitutional purposes: one for procedural due process, another for substantive due process, and another for takings. Merrill, supra note 65, at 911.

96. *Coll. Sav. Bank*, 527 U.S. at 673. This definition is actually quite regressive; it would exclude many interests now recognized as constitutional "property," such as entitlements. Compare id. (defining property in terms of the right to exclude), with Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"), and Hart & Wechsler, supra note 27, at 533 (arguing that the decision in *College Savings Bank* "cast doubt on thirty years of 'new property' decisions under the Fifth and Fourteenth Amendments"). Perhaps, however, the Court would now explicitly endorse Professor Merrill, supra note 65, and conclude that entitlements are property for some purposes, for example, a right to some kind of a hearing, but not for others.

the parcel as a whole constitutes the relevant "property" for purposes of a regulatory takings inquiry.[97]

3. *Some Additional Examples.* — Other decisions confirm the proposition that whenever the Court sees the issue before it as involving the constitutional significance of state law, the Court treats it as involving the meaning of the Constitution itself. In the context of "liberty," the Court has decided for itself whether interests created by state law were sufficient to constitute liberty within the meaning of the Due Process Clause.[98] And while one might have supposed the question whether a state had waived its sovereign immunity from suit[99] should be determined by reference to state law, this is not so, said a unanimous Court in *Lapides v. Board of Regents of the University System of Georgia*: "[W]hether a particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity is a question of federal law."[100] *Lemon v. Kurtzman* made the "purpose" of state law relevant for Establishment Clause challenges.[101] Purpose, however, is judged by an independent federal standard.[102] The formal legal incidence of a state tax, which in the past often determined the constitutional immunity of the United States from state taxation, presents a federal question.[103] In *Ring v. Arizona*, the Court

---

97. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002). Effectively (albeit perhaps not technically), this approach goes a very long way toward repudiating the last vestiges of the divisibility of estates approach of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Justice Thomas's dissent, joined by Justice Scalia, expressed bewilderment at the Court's treatment of the "parcel as a whole" proposition as "settled" law. 535 U.S. at 355 n.* (Thomas, J., dissenting). For a brief but illuminating discussion of this issue, see Charles M. Haar & Michael Allen Wolf, *Euclid* Lives: The Survival of Progressive Jurisprudence, 115 Harv. L. Rev. 2158, 2189–91 (2002) (discussing and defending *Tahoe* majority).

98. E.g., Sandin v. Conner, 515 U.S. 472, 487 (1995); see Hart & Wechsler, supra note 27, at 534–35 (describing cases dealing with the "respective roles of state and federal law in defining" liberty).

99. A waiver by a state is an "intentional relinquishment or abandonment of a known right." United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see *Coll. Sav. Bank*, 527 U.S. at 680 ("The whole point of requiring a 'clear declaration' *by the State* of its waiver is to be certain that the State in fact consents to suit.").

100. 535 U.S. 613, 623 (2002). Here the Court seemingly conflates waiver with forfeiture. See Hart & Wechsler, supra note 27, at 1037–38.

101. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

102. See, e.g., Stone v. Graham, 449 U.S. 39, 41 (1980) (rejecting state court characterization of the purpose of a state statute). In *Edwards v. Aguillard*, the Court claimed to be "normally deferential" to the state articulation of a secular purpose. The language had no operative significance, however. 482 U.S. 578, 586–87 (1987) (finding state's avowed secular purpose "a sham").

103. When the rules on intergovernmental immunity had a shape quite different from present doctrine, the Court disregarded state law labels. See Robert Post, Federalism in the Taft Court Era: Can It Be "Revived"?, 51 Duke L.J. 1513, 1531 n.61 (2002) (collecting cases); see also the line of decisions beginning with Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989), dealing with whether a state tax discriminates against federal employees. Unsurprisingly, arguable counterexamples exist.

held that the scope of the constitutional right to trial by jury in capital cases could not be concluded by state characterization of a matter as a sentencing factor rather than as an element of the crime.[104] And a state court "trial judge's characterization of his own ruling is not controlling for purposes of double jeopardy."[105]

4. *Statutes.* — The visibility of the characterization issue has emerged most clearly in the federal statutory context. The general premise is that "when it enacts a statute [Congress] is not making the application of the federal act dependent on state law."[106] This is true even when the federal law refers to state legal materials.[107] *First Agricultural National Bank v. State Tax Commission* is a good example of the general proposition.[108] The Court disagreed with the highest state court on the legal incidence of a state tax. The state supreme court held that the state sales tax was "not imposed upon the [federally chartered national] bank . . . but [was] a tax upon vendors who sell tangible personal property to the bank."[109] The Supreme Court responded: "Because the question here is whether the tax affects federal [statutory] immunity, it is clear that . . . we are not bound by the state court's characterization of the

---

Justice Ginsburg's dissent in Bush v. Gore, 531 U.S. 98, 138 n.1 (2000), refers to Gurley v. Rhoden, 421 U.S. 200, 208 (1975), in which the Court in the different context of a due process challenge to a state tax accepted the state court's conclusion as to the legal incidence of the state tax: "When a state court has made its own definitive determination as to the operating incidence, . . . [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." The *Gurley* Court relied upon American Oil Co. v. Neill, 380 U.S. 451, 455–56 (1965). See also N.Y., Phila. & Norfolk Tel. Co. v. Dolan, 265 U.S. 96, 98 (1924) ("[W]hen the State Court . . . has come to [a] conclusion . . . we should be slow to differ from it upon a matter having so many purely local elements, even if we did not think it right, as we do.").

104. 536 U.S. 584, 588–89 (2002).

105. Price v. Vincent, 123 S. Ct. 1848, 1853 (2003). This pattern is also deeply ingrained in the Court's Section 5 jurisprudence. Whether a federal statute is remedial under Section 5 of the Fourteenth Amendment, or is an impermissible effort to expand "substantive" rights is an issue that calls for the Court's independent judgment, without any deference to Congress, on the issue of characterization. That was the implicit premise of both the majority and dissenting opinions in Nevada Department of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003) (upholding Family and Medical Leave Act after a searching inquiry into its validity under Section 5 of the Fourteenth Amendment).

106. Jermone v. United States, 318 U.S. 101, 104 (1943).

107. Thus, whether a state court guilty plea amounts to a "conviction" for federal law purposes is determined by a federal standard. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 111–12 (1983). The most recent illustration is Scheidler v. National Organization for Women, Inc., 123 S. Ct. 1057, 1061 (2003), in which the Court held that a federal statutory reference to state law prohibitions of extortion absorbs state law only when that law "requir[es] a party to obtain or to seek to obtain property . . . ." See generally Hart & Wechsler, supra note 27, at 723.

108. 392 U.S. 339 (1968).

109. Id. at 346.

tax."[110] The Court went on to conclude, contrary to the state court, that the state law "imposes the legal incidence of the tax upon the [bank]."[111]

Two recent decisions involving the federal tax lien statute[112] provide excellent examples of the federal nature of the characterization issue. At issue in *Drye v. United States* was whether an insolvent taxpayer's right to inherit his mother's estate under state intestacy law constituted "property" or a "right to property" to which a federal tax lien attached.[113] Holding a taxpayer's valid state law disclaimer ineffective for federal law purposes, a unanimous Court said that "[w]hen Congress so broadly uses the term 'property,' we recognize . . . that the Legislature aims to reach 'every species of right or interest protected by law and having an exchangeable value.'"[114] The Court added:

> The question whether a state-law right constitutes "property" or "rights to property" [under § 6321] is a matter of federal law. We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as "property" or "rights of property" within the compass of the federal tax lien legislation. . . . Just as "exempt status under state law does not bind the federal collector" . . . so federal tax law "is not struck blind by a disclaimer."[115]

More recently, the Court (contrary to *College Savings Bank*) explicitly invoked the familiar "bundle of sticks" understanding of property, concluding that a taxpayer who held a tenancy by the entirety possessed sufficient "sticks" to constitute a "right to property" within the meaning of the tax lien statute.[116] The Court added:

> In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien.[117]

In the statutory context, however, the characterization issue is more complex than in constitutional cases. There are occasions—albeit not many—in which the Court has accepted the state court's characterization. In *Reconstruction Financial Corp. v. Beaver County*, for example, the scope of Reconstruction Financial Corp.'s (RFC) federal tax exemption

---

110. Id. at 347.

111. Id.

112. 26 U.S.C. § 6321 (2000).

113. 528 U.S. 49, 52 (1999).

114. Id. at 56 (quoting Jewett v. Comm'r, 455 U.S. 305, 309 (1982)).

115. Id. at 58–59 (citations and internal quotation marks omitted).

116. United States v. Craft, 535 U.S. 274, 278–79, 284–85 (2002); see Haar & Wolf, supra note 97, at 2190–91 & nn.128–129 (discussing the use of the bundle of sticks metaphor in property cases).

117. *Craft*, 535 U.S. at 279.

from personal but not real estate taxes was at issue: Is free-standing heavy machinery "real property," as Pennsylvania law so characterized it?[118] The Court accepted the state law characterization,[119] and the result has considerable intuitive appeal. Congress could fairly be charged with accepting state law variations in the application of the statutory exemption. Bizarre applications (such as characterizing an automobile as real property) would "patently run counter to the terms of the Act,"[120] and could be avoided through standard preemption analysis.[121] The same approach is equally attractive in situations in which federal law employs definitions whose terms generally are to be filled out by reference to state law.[122] Of course, there is a crucial and all-important antecedent—or gate keeping—question: whether the meaning of the term is to include any reference to state law.[123]

RFC demonstrates that no one-to-one link exists between constitutional and statutory interpretation. Our constitutional tradition, to which I subscribe, is that *Marbury v. Madison* ("political questions" aside) requires that the Court must exercise independent judgment on the meaning of constitutional language.[124] *Chevron* makes clear, however, that no similar constitutional imperative exists with respect to federal statutory interpretation.[125] Nonetheless, decisions in which the characterization

---

118. 328 U.S. 204, 209–10 (1946).

119. Id. at 208.

120. Id. at 210.

121. Indeed, a preemption analysis could have been employed in *Drye*: The state disclaimer rule threatened to undercut federal tax lien policy. 528 U.S. 49, 58–59 (1999). But, as the dissent shows, a preemption argument is less clearly available in *Craft*. *Craft*, 535 U.S. at 292–93 (Thomas, J., dissenting).

122. See, e.g., De Sylva v. Ballentine, 351 U.S. 570, 580–82 (1956) (holding copyright statute protected "children" of deceased author).

123. See, e.g., Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989) ("The initial question we must confront is whether . . . Congress intended the [Indian Child Welfare Act, 25 U.S.C. § 1911 (2000),] definition of 'domicile' to be a matter of state law."); see also Clackamas Gastroenterology Assocs. v. Wells, 123 S. Ct. 1673, 1679 (2003) (stating that federal standard governs issue of who is an "employee" for purposes of the Americans with Disabilities Act). Who is an "agent" for purposes of Title VII, 42 U.S.C. § 2000e(b) (2000), is to be decided by general principles, not by reference to the law of any state. Mateu-Anderegg v. School Dist., 304 F.3d 618, 623 (7th Cir. 2002).

124. See Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 7–14, 32–34 (1983) [hereinafter Monaghan, Administrative State]. This Article is not the occasion to join issue with the emerging and aggressive "shared meaning" school. The most recent essay advancing the shared-meaning banner (i.e., Congress wins if it advances politically correct values) is Keith E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses, 80 N.C. L. Rev. 773, 827–44 (2002); see also sources cited supra note 7.

125. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); see Monaghan, Administrative State, supra note 124, at 32–33 ("[T]here never has been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather the judicial duty is to insure that the administrative agency stays within the zone of discretion committed to it by its organic Act.").

issue is decided by reference to state law are quite infrequent. When, for example, federal statutory law (as in the tax lien cases) is seen as constraining state law interests, the Court seems strongly inclined to determine for itself the characterization issue based on a federal standard. So too in heavily regulated areas, even when the issue is the scope of a federal permission.[126] The intuition seems to be that a plenary reservation is necessary to ensure effective implementation of federal law.[127]

These cases as well as the constitutional characterization cases show that, although state law materials are relevant, the issue of characterization, as distinguished from redetermination, is purely one of constitutional or federal statutory interpretation on which the Supreme Court has since *Marbury v. Madison* exercised independent judgment. There is no room for deference. Understanding that the characterization cases do not in fact invoke the Court's authority to review state-court state-law determinations helps clarify when the Court does engage in such review and what the scope of its authority is when it does so.

B. *A Note on the Adequate Nonfederal Ground Doctrine*

Murdock v. City of Memphis[128] is generally taken to be the fountainhead of the adequate nonfederal ground doctrine, but that decision did not give us the doctrine in its modern form. In fact, it does not involve the modern understanding of the doctrine at all:

> The leading and most frequently cited case in the field, [*Murdoch,*] . . . originally established the unqualified proposition that *every* federal question of importance actually decided by the state court should be reviewed and decided by the Supreme Court. Only if the federal question were incorrectly decided below—and obviously this presupposed an examination of the merits—would the Court look for an independent non-federal ground adequate to support the judgment and prevent reversal in spite of the federal error.[129]

---

126. E.g., Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 369 n.5 (2002) ("We have, in a limited number of cases, found certain contracts not to be part of the 'business of insurance' under McCarran-Ferguson, [15 U.S.C. §§ 1011–1015 (2000),] notwithstanding their classification as such for the purpose of state regulation."). There are other contexts, of course, that involve the application of this principle. E.g., Carey v. Saffold, 536 U.S. 214, 223 (2002) ("Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears.").

127. See supra note 49. But, as mentioned, that intuition has far less pull when the scope of a federal permission in a non-regulatory context is involved or when federal statutory law incorporates state law for definitional purposes. Preemption analysis will ordinarily suffice to protect federal interests in such statutory regimes. Moreover, at the end of the day the whole matter, unlike constitutional cases, is in the hands of Congress, which can recalibrate the scope of federal statutory displacement of state law.

128. 87 U.S. (20 Wall.) 590 (1874).

129. Note, Supreme Court Disposition of State Decisions Involving Non-Federal Questions, 49 Yale L.J. 1463, 1463–64 (1940) (internal citations omitted) [hereinafter Yale

Under this view, the nonfederal ground doctrine was a test for determining the disposition of a case on the merits after jurisdiction had been taken, not a test for determining the existence of jurisdiction itself.

Murdock itself fully confirms this analysis. The Court said that "[i]t has been many times decided" that motions to dismiss for want of jurisdiction must be denied if the "plaintiff in error [properly] raised . . . one of the questions specified in the statute."[130] If so, "the jurisdiction of [the] Court attache[s], and we must hear the case on its merits."[131] If (as in *Murdock* itself) the federal question was correctly decided below, the judgment must be affirmed:[132]

> But when it appears that the Federal question was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, if there are no other issues decided in it than that. It often has occurred, however, and will occur again, that there are other points in the case than those of Federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.[133]

These principles are reflected in the fifth and sixth of the seven "propositions" the Court announced as governing its review of state court judgments:

> 5. If [the Court] finds that [the federal issue] was rightly decided, the judgment must be affirmed.
> 6. If [the federal issue] was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.[134]

Note]. For a more elaborate review of the authorities, see Morris L. Weisberg, Note, Supreme Court Review of State Court Decisions Involving Multiple Questions, 95 U. Pa. L. Rev. 764, 768–69 (1947) (criticizing the "jurisdictional" approach of Herb v. Pitcairn, 324 U.S. 117 (1945)).

130. *Murdock*, 87 U.S. (20 Wall.) at 628 (referring to section 25 of the Judiciary Act).

131. Id. For another decision holding that the nonfederal ground doctrine was not a jurisdictional barrier, see Railroad Co. v. Maryland, 87 U.S. (20 Wall.) 643 (1874), decided with or shortly after *Murdock*. The Court overruled a motion to dismiss for want of jurisdiction where the state court had decided both a federal and a state question against the plaintiff in error: "[W]here the Federal question has been raised, and has been decided against the plaintiff in error, the jurisdiction has attached, and it must be heard on the merits." Id. at 645.

132. *Murdock*, 87 U.S. (20 Wall.) at 627. The dissenting opinion of Justice Clifford, joined by Justice Swayne, agreed on this point. Id. at 638–39 (Clifford, J., dissenting).

133. Id. at 634.

134. Id. at 636. The Court had earlier explained its rationale for proposition six:

> But in the other cases supposed, why should a judgment be reversed for an error in deciding the Federal question, if the same judgment must be rendered on the

Thus, "[t]he presence of a nonfederal question might require affirmance of a judgment containing federal error, but would not bar the assumption of jurisdiction to expose and correct that error."[135]

Nineteen years after *Murdock*, however, *Eustis v. Bowles* characterized the adequate nonfederal ground as "jurisdictional" in the sense that we now understand that term.[136] Indeed, the unanimous Court suggested that an intellectual sea change had already occurred:

> It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.[137]

This statement was in fact wrong. In *Eustis* the state court had not decided *any* federal question; instead, it had put its decision entirely on the basis of state law.[138] *Klinger v. Missouri*[139] and *Johnson v.*

> other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the Federal question?

Id. at 634–35.

135. Yale Note, supra note 129, at 1464; see also Edward Hartnett, Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?, 75 Tex. L. Rev. 907, 924 (1997) [hereinafter Hartnett, Protecting] (noting that *Murdock* did not treat the nonfederal ground doctrine as jurisdictional, but that, with Eustis v. Bolles, 150 U.S. 361 (1893), "the Court shifted ground somewhat and held that if the state court's judgment rested [on an independent, nonfederal ground], it would simply refuse to hear the case"); Hill, supra note 71, at 954 n.38 ("In Murdock v. City of Memphis, the Court . . . took the position that the presence of an independent state ground did not deprive it of jurisdiction to affirm." (citation omitted)); Richard A. Matasar & Gregory S. Bruch, Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine, 86 Colum. L. Rev. 1291, 1309, 1320–21, 1359–62 (1986) (stating the "unassailable historical fact" that "from the Supreme Court's decision in *Murdock v. City of Memphis* in 1875, until its decision in *Eustis v. Bolles* in 1893, . . . the Court authorized reaching and deciding the correctness of federal questions in cases containing state grounds held by the Court to be adequate and independent"). The current edition of Hart & Wechsler, supra note 27, at 494, notes that *Murdock* does not state the current practice.

136. *Eustis*, 150 U.S. at 366, 370 (dismissing writ of error). Jurisdiction is understood to be judicial authority to decide a case one way or the other. United States v. Cotton, 535 U.S. 625, 630 (2002).

137. *Eustis*, 150 U.S. at 366.

138. Id. at 368–70. The lack of jurisdiction in *Eustis* was old law. See Justice Story's opinion in Crowell v. Randell, 35 U.S. (10 Pet.) 368, 391–92 (1836) (holding that unless a federal question was raised and decided in the state court, section 25 did not vest the Supreme Court with appellate jurisdiction).

139. 80 U.S. (13 Wall.) 257, 263 (1871) (dismissing writ of error where the Court was not certain that the state court had decided a federal question).

Risk,[140] both cited in *Eustis*,[141] also were cases where the state court had not decided *any* federal question.[142] The language of both section 25 of the Act of 1789 and the 1867 Act required that the federal question had been raised *and decided adversely* to the plaintiff in error.[143]

Eustis, nonetheless, proved to be a harbinger of times to come. Over the course of time, the modern version of the nonfederal ground doctrine as a "jurisdictional" limitation increasingly took hold.[144] Appeals from state court judgments resting upon a nonfederal ground were increasingly dismissed rather than affirmed.[145] More importantly, the alleged federal errors went uncorrected.[146] The Court's adoption in 1928 of Supreme Court Rule 12, which required submission of a jurisdictional statement prior to oral argument on appeals from the state courts, solidified current doctrine.[147] Today, for both the

---

140. 137 U.S. 300, 309 (1890) (dismissing writ of error where it was unclear whether the state court had decided a federal question, or had based its decision wholly on state law).

141. 150 U.S. at 366–67.

142. In *Murdock*, by contrast, a federal question was presented and decided by the state court. 87 U.S. (20 Wall.) 590, 637 (1874).

143. The two acts are set out in parallel columns in *Murdock*, 87 U.S. (20 Wall.) at 592–93. Analytically, decisions like *Eustis* do not involve the adequate nonfederal ground. "Where the case involves no federal question, review . . . must be denied, not because the state court decision was based upon [an adequate] non-federal ground . . . , but because the case submitted to and decided by the state court involved non-federal questions only." Reynolds Robertson & Francis Robison Kirkham, Jurisdiction of the Supreme Court of the United States § 85, at 150 n.7 (1936). The Court's current attitude towards the "jurisdictional" nature of claims of federal error not raised and decided in the state courts is discussed in Hart & Wechsler, supra note 27, at 542–44.

144. See supra note 136. Still, as late as the 1940s, several commentators viewed the adequate nonfederal ground rule as simply "a rule of practice." See Weisberg, supra note 129, at 768 (arguing that "the basis of the non-federal ground rule . . . is a self-imposed limitation"); Yale Note, supra note 129, at 1463 (noting that nonfederal ground rule was "originated by the Court simply as a convenient canon of self-limitation").

145. See, e.g., Live Oak Water Users' Ass'n v. R.R. Comm., 269 U.S. 354, 359 (1926) ("In cases where the state court has decided a local question adequate to support its judgment this court has sometimes affirmed, and sometimes has dismissed the writ of error. We have again considered the matter and have concluded that, generally at least, it is better practice to dismiss." (citations omitted)). Here, too, however, the Court had concluded that appellate jurisdiction was lacking because, unlike *Murdock*, the record did not show that a federal question had been raised in the state courts. Id. at 358–59; see also cases cited supra notes 131 and 136.

146. See, e.g., Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917) (stating that where the state court decision rests on an adequate and independent state ground, "the judgment does not depend upon the decision of any federal question and we have no power to disturb it").

147. Revised Rules of the Supreme Court of the United States, 275 U.S. 595, 603 (1928) (requiring litigants to file "forty copies of a printed statement particularly disclosing the basis on which it is contended this Court has jurisdiction"). On the prior practice, see Hart & Wechsler, Fourth Edition, supra note 66, at 646. Rule 12, which was adopted to ensure that litigants not be able to cast their claims as appeals, rather than as discretionary petitions for certiorari, was amended in 1932, Revised Rules of the Supreme Court of the

Court[148] and most commentators,[149] the nonfederal ground doctrine goes to the Court's "jurisdiction."[150] For the Court to disregard a state court judgment supported by an adequate nonfederal ground is now thought to contravene principles of federalism and Article III's prohibition of advisory opinions.[151]

United States, 286 U.S. 575, 602–03 (1932), and again in 1936, Amendment of Rules: Order, 297 U.S. 733, 733 (1936).

> Since the adoption of Rule 12 . . . , under the terms of which the Court considers the question of its jurisdiction prior to oral argument, the uniform practice has been to dismiss appeals from state courts when examination of the statements filed pursuant to that Rule disclose the existence of an adequate non-federal ground.

Robertson & Kirkham, supra note 143, § 85, at 150 n.8. See generally Felix Frankfurter & Adrian S. Fisher, The Business of the Supreme Court at the October Terms, 1935 and 1936, 51 Harv. L. Rev. 577, 582–97 (1938). The authors state that Rule 12 "affords one of the most fascinating studies in the history of judicial procedure." Id. at 582. It reinforced the steps taken in the Judiciary Act of 1925 towards making the Court's appellate work discretionary by screening out efforts by lawyers to invoke inappropriately the Court's mandatory jurisdiction over appeals. Id. at 582–83. But the conception of the jurisdictional nature of the adequate nonfederal ground antedates Rule 12.

148. E.g., Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945) (stating jurisdictional nature of nonfederal ground doctrine).

149. E.g., authorities cited supra note 135; Cynthia L. Fountaine, Article III and the Adequate and Independent State Grounds Doctrine, 48 Am. U. L. Rev. 1053, 1082–83 (1994) (stressing the redressability requirement of Article III).

150. I should note that some commentators still view the adequate nonfederal ground doctrine as no more than "a self imposed prudential restraint showing respect for state autonomy." Fitzgerald, supra note 17, at 83 n.10; see also supra note 144.

151. See *Pitcairn*, 324 U.S. at 125–26 (emphasizing both federalism and Article III). The Court spoke of "the partitioning of power between the state and federal judicial systems," and of "the limitations of our own jurisdiction." Id. at 125; see also, e.g., Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); Fitzgerald, supra note 17, at 82–83 & n.10 (citing cases illustrating the jurisdictional limits of the adequate nonfederal ground doctrine). That the state ground must have at least a tenable foundation in state law, already stated in earlier decisions, see supra note 134, received its canonical statement in Ward v. Love County, 253 U.S. 17, 22 (1920), which held that the Supreme Court would review whether a nonfederal ground of decision had "fair or substantial support" in state law. See infra Part III.A.

Implicit in the nonfederal ground doctrine is the idea that the Court's jurisdiction exists "to correct wrong judgments, not to revise opinions." *Pitcairn*, 324 U.S. at 126; see also Texas v. Hopwood, 518 U.S. 1033, 1034 (1996), in which Justice Ginsburg, joined by Justice Souter, explained that they had voted against review even though the issue was one "of great national importance" because the petition "challenge[d only] the *rationale*" and not the judgment of the court below. But see Hart & Wechsler, supra note 27, at 1601 n.5 (criticizing Justice Ginsburg's view on the facts of the case); cf. Price v. United States, 123 S. Ct. 986, 986 (2003) (Scalia, J., dissenting) ("Five Members of this Court have previously expressed their disapproval of vacating and remanding a Court of Appeals decision favorable to the Government in response to the Government's acknowledgment of error, not in the *judgment* below, but merely in the *reasoning* on which the lower court relied.").

Agreeing with *Pitcairn*, Professor Hartnett takes a further step and argues that the reasoning in Supreme Court opinions may be entitled to deference, but only judgments

The modern conception of the nonfederal ground doctrine necessarily invites attention to the existence and the scope of the Supreme Court's appellate jurisdiction to review state-court determinations of state law. *Murdock* is instructive on both issues. Former Supreme Court Justice Benjamin Curtis's amicus brief argued that once the Court had properly secured appellate jurisdiction, it had ancillary jurisdiction to decide *every* legal issue in the case before it.[152] Why? Because under Article III subject matter jurisdiction exists over "cases," not "issues" in cases.[153] Drawing upon language in *Osborn v. Bank of the United States*,[154] Curtis insisted that the original and the appellate jurisdiction were coextensive; in support he pointed to removed cases, where the federal court could determine all (including state law) legal issues.[155] Other eminent judges have agreed with this analysis. "If we have jurisdiction at all," Justice Bradley wrote in *Murdock*, "we have jurisdiction of the *case*, and not merely of a *question* in it."[156] The Court itself, however, expressed alarm at the

---

require obedience. Edward Hartnett, A Matter of Judgment, Not a Matter of Opinion, 74 N.Y.U. L. Rev. 123, 126–27 (1999). Insofar as the Supreme Court itself is concerned, it may be conceded that, "There is, of course, an important difference between the holding in a case and the reasoning that supports that holding." Crawford-El v. Britton, 523 U.S. 574, 585 (1998). But, contrary to Professor Hartnett, this distinction has little resonance in current American judicial practice so far as courts inferior to the Supreme Court are concerned. The state courts show no disposition to believe that they need not render obedience to the reasoning announced in Supreme Court opinions, no matter how perplexing. See, e.g., Ring v. Arizona, 536 U.S. 584, 596 (2002) (noting that the state court "understand[s] that it was bound by the Supremacy Clause" to apply Supreme Court constitutional principles announced in an earlier decision even through they were based upon a misconception of state law). The lower federal courts recognize that even Supreme Court dicta is entitled to weight. See, e.g., McDonald's Corp. v. Robertson, 147 F.3d 1301, 1315 (11th Cir. 1998) ("Because of considerations having to do with the first word in that court's name, Supreme Court dicta may be a different matter insofar as 'inferior courts' such as our own and the district courts are concerned."); Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.").

152. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 602–06 (1874). Justice Curtis published his brief in his work on federal jurisdiction. Benjamin Robbins Curtis, Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States 54–58 (George Ticknor Curtis & Benjamin R. Curtis eds., Boston, Little, Brown 1880).

153. See, e.g., Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 333 (1816) ("The judicial power shall extend to all the cases enumerated in the constitution.").

154. 22 U.S. (9 Wheat.) 738, 820 (1824) (stating that, except with respect to cases in which the Court is given original jurisdiction, "[i]n every other case, the [judicial] power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct").

155. Curtis, supra note 152, at 56–58. If this argument is thought persuasive, the Supreme Court could review and decide for itself all state-court determinations of state law on appeals from state courts so long as the litigants satisfied the diversity requirements of Article III. For a careful criticism of the "whole case" theory, see Fitzgerald, supra note 17, at 153–58.

156. 87 U.S. (20 Wall.) at 641 (Bradley, J., dissenting). Justice Clifford, joined by Justice Swayne, agreed in part. In his view, if the state court had wrongly decided the

thought that once it had jurisdiction because of the presence of a federal question, "everything in the case is open to re-examination."[157] If this were correct, the Court opined, "it follows that every case tried in any State court, from that of a justice of the peace to the highest court of the State, may be brought to this court for final decision on all the points involved in it."[158] Such an undesirable consequence impelled the Court to conclude that it lacked statutory jurisdiction to undertake such review. Indeed, the Court seemingly disclaimed *any* authority whatsoever to engage in review of state-court determinations of state law:

> But this examination into the points in the record other than the Federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such have been decided, and their sufficiency to maintain the final judgment, as decided by the State court. Beyond this we are not at liberty to go . . . .[159]

Murdock, it should be noted, clearly established that the existence of a jurisdiction-conferring federal question in the record was, by itself, not sufficient to authorize jurisdiction in the Court to decide *all* issues of state law in the case. But how about some? In a classic essay, Herbert Wechsler argued that the Court could do so when—and only when—"the existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law."[160] That is, the Court could review state law claims upon which the litigant *must* first prevail in order to prevail on the federal claim. *Murdock* itself nicely illustrates the distinction. The state court plaintiff had claimed rights to real property under both a conveyance governed entirely by state law and also under a

---

federal question, the Supreme Court could decide all the state law issues in the case. Id. at 638–39 (Clifford, J., dissenting).

157. Id. at 628.

158. Id. While noting that the Court's resolution of the statutory issue is open to question, Professor Wiecek concluded that the Court was concerned with its mounting case load. In any event, he believes that *Murdock* was "a godsend for the American federal system." William M. Wiecek, *Murdock v. Memphis*: Section 25 of the 1789 Judiciary Act and Judicial Federalism, *in* Origins of the Federal Judiciary 223, 242–43 (Maeva Marcus ed., 1992).

159. *Murdock*, 87 U.S. (20 Wall.) at 635. The Court continued, "[A]nd we can only go this far to prevent the injustice of reversing a judgment which must in the end be reaffirmed, even in this court, if brought here again from the State court after it has corrected its error in the matter of Federal law." Id. The Court did suggest that Congress might confer broader authority. Id. at 620 ("We are under no necessity, then, of supposing that Congress, in the section we are considering, intended to confer on the Supreme Court the whole power which, by the Constitution, it was competent for Congress to confer in the class of cases embraced in that section."); see also St. Louis, Iron Mountain & S. Ry. v. Taylor, 210 U.S. 281, 292 (1908) ("[O]ur jurisdiction [over decisions of state courts] extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power.").

160. Wechsler, Appellate Jurisdiction, supra note 24, at 1054.

subsequent act of Congress.[161] The state court rejected both grounds, and the Supreme Court affirmed the rejection of the federal claim.[162] But the Court ordered reargument on the question whether it had jurisdiction to review the state-court determination of state law.[163] A 5-3 majority answered the question in the negative on statutory grounds. Wechsler agreed. Were either ground sustained, he observed, the plaintiff would have fully prevailed. Thus the state and federal claims were logically and functionally independent.[164] Accordingly, no appellate jurisdiction existed over the state law claim.

While Wechsler's position is fully consistent with *Murdock*, that decision does not suggest, let alone invoke, Wechsler's analysis. Nor can I find it clearly articulated in prior works.[165] This is Wechsler's own effort, a successful one I believe, to clarify and rationalize principles foreshadowed in a few prior decisions.[166] Hart and Wechsler correctly state that "[t]he distinction between these two types of cases [described by Wechs-

---

161. *Murdock*, 87 U.S. (20 Wall.) at 596–98. While this would now be the standard account of the case, Justice Bradley's dissent persuasively argued that the record in fact presented no federal question. Id. at 639–41 (Bradley, J., dissenting).

162. Id. at 601. On further consideration, the Court again affirmed its rejection of the federal claim. Id. at.636–38.

163. Id. at 601–02.

164. See Wechsler, Appellate Jurisdiction, supra note 24, at 1056 (arguing that the Supreme Court should not review state law where the state and federal claims are "wholly independent of each other"). By contrast, Wechsler observed, had resolution of the state law claim stood in the way of the vindication of the federal claim, the Supreme Court could review the state-court determination. Id. at 1050–56. For example, suppose that the plaintiff claimed a federal right and the defendant: (a) set up the state statute of limitations, and (b) denied the existence of the asserted federal right. For the plaintiff to prevail, he or she must prevail on both issues. Since the state law claim is logically anterior to the federal claim, under Wechsler's view the Supreme Court could exercise independent judgment if the statute of limitations defense were sustained. Id.

165. See, for example, the comprehensive discussion in Robertson & Kirkham, supra note 143, §§ 84–90, which contains no hint of the distinction. Revealingly, they qualify their discussion thus: "Whether or not the non-federal ground rule may properly be said to present a limitation of a strictly jurisdictional nature . . . ." Id. § 85, at 150 n.8. This formulation ignores the circumstances in which, according to Wechsler, the nonfederal ground does involve constitutionally mandated jurisdictional limitations.

166. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), does foreshadow Wechsler's distinction. After concluding that the Court could examine the title to real property under state law that was alleged to be protected from confiscation by treaty, Justice Story said that section 25 of the Judiciary Act of 1789 did not permit it to examine unrelated state law issues. See id. at 358–59; infra note 276 and accompanying text (quoting *Martin*). Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 376 (1821), contains a similar suggestion, as does Smith v. Maryland, 10 U.S. (6 Cranch) 286, 304–05 (1810). The closest modern anticipation of Wechsler's formulation of which I am aware is Fox Film Corp. v. Muller, 296 U.S. 207 (1935). Justice Sutherland wrote, "The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there." Id. at 211.

ler] is critical to understanding this area of the law."[167] The authors explain:

> *"Antecedent" vs. "Distinct" State Law Grounds.* In Murdock, the non-federal issue . . . was logically (and functionally) quite distinct from any issue of federal law; answering the state law question was not a necessary antecedent to any question of federal law. Put differently, had the Supreme Court resolved the federal issue in favor of Murdock (the purported federal rightholder), he would have obtained all the relief he sought, regardless of the state court's resolution of the non-federal issues.
>
> In *Martin v. Hunter's Lessee*, by contrast, the state law question (did the Commonwealth of Virginia obtain title by escheat before any federal treaty took effect) was an essential antecedent to the application of the federal treaty provisions giving protection to then-existing land titles.[168]

* * *

In light of the foregoing discussion of the adequate nonfederal ground doctrine, the Court's recent decision in *Green Tree Financial Corp. v. Bazzle*[169] is puzzling. There, homeowners brought state-court class actions against a commercial lender alleging violations of the state consumer protection law. Petitioner moved to compel arbitration pursuant to a provision in the lending agreements, a provision governed by the Federal Arbitration Act (FAA).[170] The FAA, which provides protection for state-law created interests, has been interpreted to be a kind of equal protection clause: State laws targeting arbitration clauses for unfavorable treatment are preempted;[171] the validity of arbitration provisions, however, is determined in accordance with ordinary state-law contract princi-

---

167. Hart & Wechsler, supra note 27, at 493. Wechsler identified the most typical and most pervasive fact pattern. As previously noted, I would, however, slightly recast Wechsler's formulation to embrace cases like *Bush v. Gore*, which could be seen as involving logically antecedent questions of state law, but which might better be understood as involving constitutional constraints upon, or indeed constitutional incorporation of, state law. For me, whenever the Constitution directly makes relevant the content of state law at a given point in time, the Supreme Court possesses appellate jurisdiction to review what the state law was at the relevant point in time.

168. Id. That is, "Martin had to prevail on both the non-federal issue (that his chain of title had not been divested at the time of the Treaty of Peace) and the federal law issue (that the Treaty protected that title against the Act of Compromise or other [state legislature] efforts to divest it)." Id.

169. 123 S. Ct. 2402 (2003).

170. 9 U.S.C. §§ 1–307 (2000).

171. Courts are directed "to place arbitration agreements on equal footing with other contracts." EEOC v. Waffle House, Inc., 534 U.S. 279, 293 (2002). The development of the Court's jurisprudence in this area is sharply and powerfully criticized in Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 331 ("So bold has the Court been [in rewriting arbitration laws] that its work . . . could be said to exemplify the indeterminacy of American law, confirming the hypothesis . . . that our

ples.[172] In *Green Tree*, petitioner claimed that the arbitration provision clearly precluded class-wide arbitration. Applying state contract law, however, the state supreme court held that the arbitration provision was silent on that question, and in those circumstances ordinary state contract law permitted class-wide arbitration.[173] The Supreme Court vacated the judgment. Justice Breyer's four-person plurality began:

> Whether Green Tree is right about the contracts themselves presents a disputed issue of contract interpretation. The Chief Justice believes that Green Tree is right; indeed, that Green Tree is so clearly right that we should ignore the fact that state law, not federal law, normally governs such matters and reverse the South Carolina Supreme Court outright.[174]

So far, so good. Yet Justice Breyer then went on to say: "At the same time, we cannot automatically accept the South Carolina Supreme Court's resolution of this contract-interpretation question. Under the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide."[175] But why wasn't the entire Court bound to "automatically accept" the state court decision? Since there was no claim that the state law impermissibly targeted the arbitration provision for hostile treatment, no federal claim apparently existed. Whether the state court correctly determined an allocation issue (i.e., who decides, court or arbitrator) is an issue of state contract law only, and one that is not antecedent to any federal claim, and thus, standard application of the adequate nonfederal ground doctrine should have barred review. Or is the Court implicitly "federalizing" arbitration law, at least in terms of allocation of roles between courts and arbitrators?[176]

---

judges . . . are uncontrolled by legal texts or precedents and free to decide cases according to their own political predilections.").

172. Courts "should apply ordinary state-law principles that govern the formation of contracts." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); accord Stone v. Doerge, 328 F.3d 343, 345 (7th Cir. 2003) (Easterbrook, J.) (stating that most disputes about the scope or meaning of an arbitration clause "must be resolved under state law"). Applying, at least ostensibly, ordinary state law contract principles of unconscionability, lower courts have increasingly refused to enforce one-sided arbitration clauses, particularly in the employment context. E.g., Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170–73 (9th Cir. 2003).

173. *Green Tree*, 123 S. Ct. at 2404. The Chief Justice, joined by Justices O'Connor and Kennedy, dissented. Id. at 2409 (Rehnquist, C.J., dissenting). Justice Stevens joined the plurality's disposition because the class-wide arbitration "was correct as a matter of law." Id. at 2408 (Stevens, J., concurring). Justice Thomas dissented on the ground that the FAA was inapplicable in state courts. Id. at 2411 (Thomas, J., dissenting).

174. Id. at 2406 (plurality opinion) (citations omitted).

175. Id. at 2407.

176. Justice Breyer seems particularly enamored of such an approach. See, e.g., Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–86 (2002) (distinguishing between "gateway" issues concerning arbitration which require judicial resolution, and other arbitration issues that are properly left to the arbitrator). Concurring in the result, Justice Thomas thought the allocation issue was simply a matter of state law. Id. at 87 (Thomas, J.,

III. Supreme Court Review of State Law Determinations in Federal Cases

This Part is the normative heart of the Article: It examines the scope of the Court's authority to review state-court determinations of state law in constitutional cases. That is, to what extent can the Court examine the state law materials properly before the state court and determine for itself what the state law was at a given point in time.

A. *Introduction and Partial Conclusion*

Beginning with an exploration of the implications of the Supremacy Clause, this Part examines the merits of what have emerged as the two competing standards of review: independent judgment and deference (fair support) review. Acknowledging the appeal of deference review, I submit that independent judgment is the ultimate measure of the Court's jurisdictional authority. Part III.B provides numerous historical examples of the exercise of such review.

1. *The Supremacy Clause.* — On the same day that the constitutional convention rejected an effort to invest Congress with a veto power over state law, it adopted an early version of the Supremacy Clause.[177] This meant that "it was [now] evident that the authority of the national government would depend on judicial enforcement."[178] Some review of state-court state-law determinations seemed inevitable if the supremacy of federal law was to be maintained.[179] Thus, in *Bush v. Gore*, no member of the Court denied that some review of the state court's interpretation of the Florida electoral law fell within the Court's appellate jurisdiction. Nor have many recent commentators. Professor Tribe, for example, categorically rejected the claim "that the concurring opinion poked its nose

---

concurring). Hart & Wechsler suggest that perhaps the Court means that if the allocation issue is unclear, "there is a federal presumption (which a state court must respect) that the issue is arbitrable . . . ." Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 15 (Supp. 2003). What would be the source of such a presumption?

177. Rakove, supra note 81, at 82.

178. Id. at 173; see also id. at 81–82 (detailing the adoption of the Supremacy Clause).

179. E.g., Ward v. Love County, 253 U.S. 17, 22–23 (1920) (stating that claimants were entitled to bring question of federal right to the Court); Hill, supra note 71, at 949, 990 (relying on the Supremacy Clause); Wechsler, Appellate Jurisdiction, supra note 24, at 1054 (same). Such review is permissible whenever it is "necess[ary] to maintain the effectiveness and uniformity of the federal law." Id. at 1056. Other justifications have been advanced, such as the "whole case" theory, see supra text accompanying notes 152–158, but they hold little attraction for modern commentators. Professor Currie playfully toys with the argument that this view of the Constitution is not a logical necessity. The constitutional constraints on state law could "as a matter of logic" take the state law as conclusively determined by the state courts. David P. Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835, 49 U. Chi. L. Rev 646, 686 n.256 (1982). But he, of course, recognizes that adoption of such a view would severely undermine federal constitutional constraints. Id. at 686.

into a realm that was none of the Supreme Court's business. . . . [I]t plainly *was* the Supreme Court's business, as it always is when a federal constitutional norm speaks directly to a challenged exercise of state power."[180]

In a wide-ranging, elaborately documented, and provocative essay, Professor Fitzgerald challenges these premises. Acknowledging that her view "departs significantly from other commentary and from the Court's practice for most (but not all) of its history,"[181] she argues that the proffered state ground must he accepted at face value unless "proven mistrust" of the state ground has been established.[182] "[T]he Court should have to admit that mistrust and identify some concrete basis for it."[183] That seems tantamount to effectively barring Supreme Court review of the proffered nonfederal law ground, since few indeed will be the occasions in which the Court will be prepared explicitly to charge the state-court judges with violating their oaths to support the Constitution.[184] Professor Fitzgerald posits that "[t]he Constitution's values of state independence and of federal supremacy have been in tension from the start."[185] For her, however, principles of state autonomy permit virtually no review of nonfederal grounds. Professor Fitzgerald's positive case for such a far-reaching departure from our practice is, to my mind, not convincing.[186] She argues that "*Erie*'s principle of state-court prerogative over state law should strongly influence any theory of Supreme Court appellate jurisdiction to reverse state-law grounds."[187] I agree. But nothing

180. Tribe, supra note 8, at 191.

181. Fitzgerald, supra note 17, at 97.

182. See id. at 91–99.

183. Id. at 90. In other places, Professor Fitzgerald speaks of establishing "cheating" by the state court. E.g., id. at 99, 177.

184. Id. at 99. She admits that her proposal entails "calling States names," but that is a virtue, not a defect, because it will reign in the Court's "casual use of a reversal power that does, after all, both encroach on states' turf and exceed the limits of the Court's formal jurisdiction." Id. There are decisions that can be seen to rest on this conception. See id. at 120 n.160. None is of recent vintage.

185. Id. at 115. I should add that I do not put these two values on the same scale that Professor Fitzgerald apparently does. The Supremacy Clause itself forbids that approach.

186. Some of her challenges to the more orthodox positions seem to proceed from the premise that her position is correct ab initio. She argues, for example, that orthodox theories give the Court "automatic subject matter jurisdiction to decide questions affecting federal interests wherever those federal interests lurk." Id. at 162; see also id. at 159 (criticizing those holding the view that "the Court's central role in enforcing federal-law supremacy gives it a standing jurisdiction to vindicate any federal right or other interest, even (or, perhaps, especially) if it is lurking behind a state-law question" (footnote omitted)). Few if any authors would endorse that formulation. She then adds, "even if it means ignoring [the] formal jurisdictional . . . bar on state ground reversals." Id. at 162. This seems circular. The entire issue is what the adequate nonfederal ground "jurisdictional bar" in fact means with respect to Supreme Court review of state law determinations.

187. Id. at 92 n.47. Her *Erie*-based challenge is reinforced by her apparent objection to existing doctrine as to what constitutes an "adequate" state ground. She apparently objects to inadequacy holdings not required by the Constitution. Id. at 160. This is not the

in that opinion or its logic suggests that it can be invoked to thwart the supremacy of valid federal law, as Herbert Wechsler long ago noted.[188] More directly, Professor Fitzgerald invokes some of the Court's recent federalism decisions.[189] Decisions like *Alden v. Maine*,[190] barring private damage actions against states, which she cites approvingly, are small beer so far as threatening the supremacy of federal law is concerned.[191] Moreover, our constitutional order presupposes that valid federal law be capable of *systematic* enforcement, not that every individual wrong be remediated by damages.[192] Effectively, as noted, Professor Fitzgerald makes the state ground unreviewable. This is unacceptably narrow.[193] "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal . . . to bar the assertion of [the federal right] even upon local grounds."[194]

---

place to examine current adequacy doctrine, but I fail to see the link between current adequacy doctrine and the Court's review of state-court determinations of state law. Moreover, if she would hold that only constitutionally infirm grounds are inadequate, then I would think that this augurs for greater, not lesser, scrutiny of the assertedly "independent" state ground.

188. "Because of that relationship" (i.e., the state law is antecedent to the federal claim) "the state court does not speak the final word on the state question . . . ." Wechsler, Appellate Jurisdiction, supra note 24, at 1054 (quoted in Fitzgerald, supra note 17, at 159 n.324).

189. Fitzgerald, supra note 17, at 164–71. Fitzgerald does not rely upon decisions in which the Court held that Congress had exceeded its regulatory powers. These surely would not help her; no *valid* federal law is involved.

190. 527 U.S. 706, 712 (1999); see Fitzgerald, supra note 17, at 164–71. Apart from the holding itself, she invokes its "trust the state courts" flavor. Id.

191. The Court's recent decisions involving the suability of the states pose no serious threat to the supremacy of federal law. See Henry Paul Monaghan, The Supreme Court, 1995 Term—Comment: The Sovereign Immunity "Exception," 110 Harv. L. Rev. 102, 132–33 (1996). Injunctions—in state court—against future breaches are readily available. So too are suits by the United States for past damages.

192. See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1778–79 (1991), discussed in Hart & Wechsler, supra note 27, at 351–52. That some damage claims brought by individuals will be barred by sovereign and official immunity doctrines hardly compromises the supremacy clause-based principle of the need for effective systematic enforcement of federal law. But Professor Fitzgerald's extended exegesis, arguing that *Alden* weakens the "nondiscrimination" principle of Testa v. Katt, 330 U.S. 386 (1947), is revealing: She does not explain why any such result is desirable in "Our Federalism." Fitzgerald, supra note 17, at 164–70.

193. As Professor Hill put it, "it is plain that allowing the state courts the last word on the threshold question [of the meaning of state law] . . . would mean that . . . [federal law] would have only as much force as the state courts are willing to accord it." Hill, supra note 71, at 948–49. Indeed, under Professor Fitzgerald's proposal, the long lost nullification power once claimed by state conventions and legislatures would inhere in the state courts. See Fitzgerald, supra note 17, at 89–91. In Bush v. Gore, 531 U.S. 98, 115 n.1 (2000), the Chief Justice, remarking on the Court's takings cases, said that the "constitutional guarantee would, of course, afford no protection . . . if our inquiry could be concluded by a state supreme court holding that state property law accorded plaintiff no rights."

194. Davis v. Wechsler, 263 U.S. 22, 24 (1923) (citation omitted).

2. *Deference Review.* — Courts and commentators alike now quite reflexively assume that narrow review suffices to maintain the supremacy of federal law.[195] They ask only whether the state court interpretation has fair support in state law; that is, is the state court's description of state law reasonable?[196] Justice Van Devanter's opinion in *Ward v. Love County* is the doctrinal bellwether:

> The right to the [property tax] exemption was a federal right, and was specially set up and claimed as such in the petition. . . . [It] is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support.[197]

Demorest v. City Bank Farmers Trust Co.[198] provides the best-known modern example. A divided state court had rejected a due process retroactivity challenge to a state statute on the ground that its own prior decisions did not constitute fixed rules of property, but simply provided guidelines for the exercise of discretion.[199] Affirming, the Supreme Court said:

> Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. . . . But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support [the judgment must be affirmed].[200]

Lucas v. South Carolina Coastal Council[201] arguably provides an even more recent example. There, the Court held that "newly decreed" property limitations depriving land of all viable use can constitute regulatory takings if they do not "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already

---

195. Michael Wells is one exception. He argues that "*Bush* is actually a simple case of federal law constraining state authority . . . . No deference toward the state court's interpretation of state law is called for in such a case." Wells, supra note 19, at 417. I fully agree, of course, and I endorse Professor Wells's very apt formulation.

196. In the end, the Chief Justice adopted that standard in Bush v. Gore, 531 U.S. at 119–200 (Rehnquist, C.J., concurring), and that is how the dissents understood his opinion. See id. at 135–43 (Ginsburg, J., dissenting); id. at 149–52 (Breyer, J., dissenting). Professor Tribe agrees that such review is appropriate. For him, however, the Court's conclusion that the Florida Supreme Court's decision went beyond the pale of reasonableness "was itself utterly unreasonable." Tribe, supra note 8, at 191.

197. 253 U.S. 17, 22 (1920) (citations omitted). The fair support rule seems to have been fully established at least as early as Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 164 (1917).

198. 321 U.S. 36 (1944).

199. The statute prescribed a default rule for apportionment between life tenants and remaindermen under a will or trust of mortgage salvage operations. Id. at 41.

200. Id. at 42.

201. 505 U.S. 1003 (1992); see also Phillips v. Wash. Legal Found., 524 U.S. 156, 167–69 (1998) (holding that state law enacted prior to regulation determines whether interest follows the principal).

place upon land ownership."[202] In a footnote at the end of its opinion, the Court admonished the state courts that any such determination must be based on "an *objectively reasonable application* of relevant precedents."[203] Fairly read, this language is quite consistent with deference review.[204]

Limited review of this nature can be seen as akin to step two *Chevron* deference,[205] to borrow a perhaps imperfect analogy from administrative law.[206] Deference review has powerful attractions. First, when viewed from the perspective of the role of state courts in "Our Federalism,"[207] limited review recognizes the crucial point that our constitutional order assumes the state courts' central expository role on the content of state law.[208] It recognizes, moreover, that (particularly in our time) the Supreme Court cannot formulate doctrine publicly expressing distrust of

---

202. *Lucas*, 505 U.S. at 1029.

203. Id. at 1032 n.18. The word "objectively" seems to be surplusage.

204. *Lucas*'s author, Justice Scalia, urged deference review in his dissent in Rogers v. Tennessee, 532 U.S. 451, 468–69 (2001) (Scalia, J., dissenting). See infra text accompanying notes 316–317.

205. Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). For a recent discussion of the reach of *Chevron*, see United States v. Mead Corp., 533 U.S. 218, 229–38 (2001), and the thoughtful examination of *Mead*'s implications in David J. Barron & Elena Kagan, *Chevron*'s Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201.

206. In *Bush v. Gore*, Justice Ginsburg expressly drew this parallel as supporting narrow review. 531 U.S. 98, 136 (2000) (Ginsburg, J., dissenting). *Chevron* deference is said to be based on an antecedent congressional grant of authority to the agency. See *Mead*, 533 U.S. at 229–30 (stating that deference to administrative law making depends on what authority Congress has conferred upon an agency); see also Yellow Transp. Inc. v. Michigan, 537 U.S. 36, 45 (2002) (same); Barron & Kagan, supra note 205, at 212–25 (exploring the evolution of that explanation of *Chevron* and noting the decline of the political accountability rationale that was expressed in *Chevron* itself). The authors acknowledge the "perhaps . . . fictional" nature of what constitutes a congressional delegation. Id. at 203. For an elaborate and probing account of what should constitute a congressional authorization to an agency to promulgate rules having the force of law, see Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 470–72 (2002) (arguing that agency rules should be entitled to *Chevron* deference only if their violation triggers sanctions). But see infra note 221 (demonstrating that application of *Skidmore* deference varies with the circumstances).

Of course, in our constitutional order the states need no conferral of regulatory authority from the Constitution or Congress. They enter the union possessed of a residual or inherent authority to govern. They are, accordingly, generally free to allocate power among their governmental units as they see fit. See Bush v. Gore, 531 U.S. at 136–37 (Ginsburg, J., dissenting) (discussing *Chevron* and residual state authority). Some limitations on this freedom exist, however. See, e.g., Henry P. Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 524 n.23 (1970) [hereinafter Monaghan, First Amendment].

207. Younger v. Harris, 401 U.S. 37, 44 (1971).

208. Bush v. Gore, 531 U.S. at 112 (Rehnquist, C.J., concurring) ("[Deference] to the decisions of state courts on issues of state law . . . reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938))).

the state courts.[209] And it draws considerable sustenance from a more general current perception: the vast improvement of states (including their courts) as governmental mechanisms. "The states are more professional, more capable, and less venal than they once were. They are also less evidently out-of-step with mainstream national values, and those values are themselves less certain and single-minded than during such reformist periods as the 1960s."[210]

Second, deference review fits very comfortably with the transformation of the Supreme Court's role in "Our Federalism": from a court of errors and appeals (that is, a court concerned not only with whether federal law has been correctly understood but also with whether that law had been correctly *applied* to the facts) to a court of general supervisory authority over matters of federal law in order to ensure its uniformity and enforceability. This change is the product of two general historical developments. Especially with the grant of general federal question jurisdiction in 1875, Congress has conferred police-like (i.e., federal law enforcement) functions on the district courts whenever it feared that state courts might be insufficiently responsive to the commands of federal law. Correspondingly, of course, this meant that the Supreme Court could distance itself from its earlier role as a court of errors and appeals. *Murdock* was fully cognizant of this development, and of its significance.[211]

Moreover, access as of right to the Supreme Court is now long past. The increasingly discretionary nature of the Court's appellate jurisdiction, symbolized by the Judiciary Act of 1925, greatly intensified the conception of the Supreme Court as a tribunal entrusted with the ultimate responsibility of maintaining the uniformity of valid federal law. Writing of the Act, known as the Judges' Bill, in 1927, Frankfurter and Landis stated:

> At the heart of the proposal was the conservation of the Supreme Court as the arbiter of legal issues of national signifi-

---

209. See Alden v. Maine, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.'" (alteration in original) (citations omitted)). Professor Fitzgerald draws heavily on *Alden*'s principle. Fitzgerald, supra note 17, at 164–71. Yet her "proven mistrust" would make exactly that assumption whenever it was successfully invoked by petitioner. In those circumstances, however rare, the state court judges would stand accused of violating their oath to support the Constitution.

210. Keith E. Whittington, Taking What They Give Us: Explaining the Court's Federalism Offensive, 51 Duke L.J. 477, 499 (2001). This theme is widely echoed in the current political science literature. E.g., Jon C. Teaford, The Rise of the States: Evolution of American State Government (2001) (stressing the role of the states in developing policy and administrative reforms).

211. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630–31 (1875). *Murdock* was, however, decided on January 11, 1875, id. at 614, before the general grant of "arising under" jurisdiction. See Act of Mar. 3, 1875, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (2000)). The Court relied upon earlier, more specific, grants of that jurisdiction.

> cance. But this object could hardly be attained so long as there persisted the obstinate conception that the Court was to be the vindicator of all federal rights. This conception the Judges' Bill completely overrode. Litigation which did not represent a wide public interest was left to state courts of last resort and to the circuit courts of appeals, always reserving to the Supreme Court power to determine that some national interest justified invoking its jurisdiction.[212]

In 1988, the Court's appellate jurisdiction over state court judgments became wholly discretionary.[213] In addition, the Court now frequently reviews only important "federal issues" in a case, not entire "cases or controversies."[214]

These developments are surely consonant with a narrow conception of Supreme Court review of state-court determinations of state law. Moreover, deference review might be thought desirable for another reason: It reduces the possibility that the Supreme Court will get the state law "wrong."[215] This argument, of course, rests on the premise that the state court is more likely to be expert in its own law than is a distant court in Washington, D.C. The danger of Supreme Court "error" seems to me easily overstated.[216] Virtually the entire universe of constitutional cases in which the Supreme Court would be asked to redetermine the content of state law comprises situations in which the Constitution makes relevant the content of state law at t_1, and the claim is that it was impermissibly

---

212. Felix Frankfurter & James M. Landis, The Business of the Supreme Court 260–61 (1927). For a more recent expression of this point of view, see William H. Rehnquist, The Changing Role of the Supreme Court, 14 Fla. St. U. L. Rev. 1, 9–10 (1986); see also Hart & Wechsler, supra note 27, at 572.

213. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 28 U.S.C.). For a summary presentation of the relevant statutes and their evolution, see Hart & Wechsler, supra note 27, at 466–69 and 1852–56. The slow progress toward almost eliminating the Court's obligatory jurisdiction is set out in detail in Hart & Wechsler, supra note 27, at 1552–56.

214. This development is further increased by the practice—by no means securely anchored in the text of 28 U.S.C. § 1257 (2000)—of limited grants of certiorari. See Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1705–07, 1717 (2000); see also Hart & Wechsler, supra note 27, at 1591–93 (discussing the complexities involved in limited grants of review).

215. Another form of this argument is that what the state court says at t_2 about what the state law was at t_1 is the best evidence of that law, especially given our increased appreciation of the indeterminacy of law. But careful students have noted that the problem of indeterminacy can be overstated. Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 N.Y.U. L. Rev. 875, 929–30 (2003).

216. "The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . ." Michigan v. Long, 463 U.S. 1032, 1039 (1983).

changed at t_2.[217] This is a rather narrowly focused inquiry, one in which the Court will surely be alert to what the state court has said.[218]

3. *Independent Judgment.* — Despite its powerful attractions, the fair support rule should be viewed as a rule of practice only. Article III itself provides that "the Supreme Court shall have appellate Jurisdiction both as to Law and Fact," subject to congressional regulations and exceptions and subsequently to the Seventh Amendment.[219] Our constitutional structure and history strongly support the view that, at least unless validly restricted by an act of Congress, the Court possesses a residual ancillary jurisdiction independently to determine the content of state law whenever the Federal Constitution directly constrains its operation or incorporates it. That ultimate authority allows the Court to fulfill its appropriate role in "Our Federalism" in ensuring *full enforcement of valid* federal law.

Of course, in our federal system, the state court's exposition of state law cannot be (and especially now) treated as irrelevant. But any deference due to the state court in these circumstances (to borrow again from administrative law) need be no more than *Skidmore* deference: the state court's "power to persuade."[220] This, in turn, depends "upon the thoroughness evident in" the state court's "consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control."[221] These factors can produce "'substantial deference' . . . to near indifference."[222]

---

217. In fact, many cases involve t_i, t_{ii}, t_{iii}, etc. v. t_2. "Until its decision in the present case the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the Act was contractual." Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 105 (1938).

218. The Court rarely sees cases in which it was arguable that the state law was "open" at the time that the Supreme Court decided to interpret it. See supra note 22 and accompanying text.

219. U.S. Const. art. III, § 2, cl. 2; id. amend. VII. While the Seventh Amendment does not apply to proceedings in the state courts, it is applicable when the Supreme Court reviews those proceedings. See Hart & Wechsler, supra note 27, at 577 (discussing Seventh Amendment limitations on the Court's ability to review state-court proceedings).

220. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see also, e.g., Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110–11 & n.6 (2002) (applying *Skidmore* deference to EEOC's interpretive guidelines and only according deference to the extent of the agency interpretation's "power to persuade" (citing *Skidmore*, 323 U.S. at 140)).

221. United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citations and internal quotation marks omitted) (quoting *Skidmore*, 323 U.S. at 140). The Court added that "[t]he fair measure of [*Skidmore*] deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." Id. (footnote and citations omitted); see Barron & Kagan, supra note 205, at 227 n.98 ("[A]pplication of *Skidmore* deference depends so much on context and circumstance—the kind of agency, the kind of issue, the kind of decision . . . ."). At oral argument in *Clackamas Gastroentol Associates PC v. Wells*, the United States referred to this as "weight." Transcript of Oral Argument at 19, Clackamas Gastroentol Assocs. v. Wells, 123 S. Ct. 1673 (2003) (No. 01-1435).

222. *Mead*, 533 U.S. at 228.

Supreme Court review inexorably confined to preventing evasion of federal law is unwarrantably narrow. First, at least in high-visibility cases, the practical (albeit perhaps not the logical) effect of such a principle is a milder version of Professor Fitzgerald's "proven mistrust" standard: The Supreme Court must "attribut[e] bad faith" or, I would add, at least intellectual incompetence "to state officers sworn to uphold federal law."[223] As *Bush v. Gore* shows, this is surely a distasteful result, especially so in high-visibility cases. For seven justices to believe that reversal was possible only were the Court willing to publicly impugn the intellectual competence (if not the good faith) of the judges of the state court is, for me, not an agreeable aspect of "Our Federalism." By contrast, to say, "We respectfully disagree," sends an altogether different message.[224] Second, apart from its distasteful rhetoric, review limited to a search for evasion is too historically contingent. The present, very amicable, relationship between the Supreme Court and the state courts is assumed to be unproblematic and enduring.[225] Moreover, resistance to full implementation of federal constitutional norms can occur at the retail level.[226] While we see little evidence of that today,[227] today is today, not yesterday, and not tomorrow. We simply cannot predict when penetrating Supreme Court authority to review state-court determinations of state law will be necessary in "a constitution intended to endure for ages to come."[228]

At the end of the day, moreover, state court evasion of federal norms is not the ultimate issue; full enforcement of federal law is. No reason

---

223. Hill, supra note 71, at 970. As formulated, the standard could embrace, perhaps as a prophylactic measure, not only intentional but also inadvertent gross error by the state courts. So understood, the fair support rule would act as a filter that makes no assertion about the good or bad faith of the particular interpretation rejected, but that is simply calculated to reduce the opportunity for evasion in the aggregate.

224. The independent judgment rule is fairly characterized as a "nationalist" view of Supreme Court jurisdictional authority; the fair support doctrine, a "federalist" or "state-centered" one.

225. I acknowledge that it may well be, given the powerful economic, social, and cultural forces drawing the nation ever more tightly together.

226. E.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (cited by the Chief Justice in Bush v. Gore, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring)). This is one of several decisions in which the Alabama Supreme Court seemed determined to assist the Alabama political branches in destroying the NAACP. See also Staub v. City of Baxley, 355 U.S. 313, 318–19 (1958) (indicating suspicion that state procedural rule had been applied out of hostility to labor union organizing). See generally Hart & Wechsler, supra note 27, at 551.

227. The state courts can often insulate themselves from review by invoking their own constitution to "dissent" from Supreme Court rulings. Indeed, Justice Brennan urged that course of conduct once he began to fall into a minority on his own Court. See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). But, at best, this technique will result only in the overenforcement of federal law; for example, when the state court invokes its own broad understanding of federal law but also separately invokes a state law ground. The state court, however, cannot insulate itself from a claim that federal law is being underenforced.

228. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

exists for a conception of our constitutional order that *disables* the Supreme Court from, in appropriate circumstances, ensuring that both the uniformity and the supremacy of federal law are fully maintained.[229] Of course, when coupled with the law enforcement role of the inferior federal courts, fair support review ordinarily will adequately discharge the Court's obligations. But as a practical matter many cases, for example, criminal prosecutions, will remain in the state courts. And more intrusive review may be necessary, particularly in times of change,[230] or in certain controversial areas of the law.[231] Put differently, the fair support rule best suits occasions when the Court "senses" no special need to intervene; the independent judgment rule comes into play when the Court believes otherwise, whether or not that belief can be clearly articulated.

What is the source of the independent judgment (or, indeed, of the fair support) doctrine?[232] That is a topic for a paper at least as long as this one. For now, I would stand upon the historical practice under section 25 of the Judiciary Act and its successors.[233] Congress can fairly be deemed to have authorized such ancillary jurisdiction.[234] In a federal system in which the Constitution, valid federal laws, and treaties are the supreme law of the land, Supreme Court examination of state law in cases properly removed from the state courts (either by removal to the district courts or by removal on certiorari to the Supreme Court) is not anomalous.[235] Perhaps congressional legislation narrowing the Court's ancillary jurisdiction would be valid under Congress's power to make "Exceptions"

---

229. Like other courts, the Supreme Court is obliged to "give effect to the supreme law of the land." Herbert Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1006 (1965). The nature of the Court's obligation is, of course, what is at issue here. Professor Hill eschews any inquiry into the bad faith of the state courts. For him, as for me, the federal claims must be "given their due under the supremacy clause." Hill, supra note 71, at 969–70. He apparently believes, as I do not, that Supreme Court review of state law for "egregious" error or arbitrariness suffices for that purpose.

230. E.g., *Patterson*, 357 U.S. at 449 (civil rights); *Staub*, 355 U.S. at 313 (labor organizing); see also supra note 226.

231. See, e.g., Monaghan, First Amendment, supra note 206, at 526–32 (describing the Court's distrust of juries in defamation cases governed by New York Times v. Sullivan, 376 U.S. 254 (1964)).

232. Professor Fitzgerald grounds her proven mistrust standard on the supremacy of valid federal law—law that the Supreme Court can review—and the principle that the Court has jurisdiction to review its own jurisdiction. Fitzgerald, supra note 17, at 91. Proven mistrust, if established, would compromise the last principle.

233. The early constitutional practice of Congress has been accorded special weight. See, e.g., Eldred v. Ashcroft, 123 S. Ct. 769, 778–81 (2003) (emphasizing the importance of early practice under the patent and copyright clauses for constitutional purposes).

234. Ancillary jurisdiction has its roots in *McCulloch v. Maryland*. 17 U.S. (4 Wheat.) 316, 415–19 (1819) (holding that the grant of power to Congress subsumes the grant of ancillary powers to make the granted power effective); see also, e.g., 28 U.S.C. § 1367 (2000) (authorizing supplemental jurisdiction).

235. See, e.g., Tennessee v. Davis, 100 U.S. 257, 271 (1879) (permitting removal to the lower federal courts). Review in the Supreme Court of a state court judgment is simply one form of removal of a proceeding from the state to the federal court.

to the Court's appellate jurisdiction[236] if only federalism values are thought to be at issue. Congress has considerable, albeit not unlimited, power to determine the limits on the exercise of national institutional authority against the states.[237] But the inquiry becomes much more complicated when Article III is also brought into sight. Of course, an important distinction exists "between the obligation of a trial court to decide all the issues fairly presented and the ability of an appellate court to limit its review of issues of particular importance."[238] Article III, however, itself establishes one "supreme Court."[239] Moreover, congressional authority to limit the Court's jurisdiction once appellate jurisdiction exists over cases involving federal subject matter is especially debatable.[240] In the end, however, it suffices for present purposes to claim that the Court's historical practice provides support for the existence of an ancillary authority to exercise independent judgment over state-law determinations in federal cases.

B. *The Historical Basis of Independent Judgment*

When asked whether he believed in infant baptism, Old Ezra replied: "Believe in it? Why, man, I've seen it done!"[241] Like Old Ezra, I place a considerable premium on the lessons of history and experience rather

---

236. U.S. Const. art. III, § 2, cl. 2.

237. Any standard work on the jurisdiction of the federal courts provides examples of numerous limitations on the exercise of the potential jurisdiction of the district courts. See, e.g., 28 U.S.C. § 2283 (2000) (Anti-Injunction Act).

238. Hart & Wechsler, supra note 27, at 1593 (citing Daniel J. Meltzer, Harmless Error and Constitutional Remedies, 61 U. Chi. L. Rev. 1, 15–17 (1994)).

239. U.S. Const. art. III, § 1, cl. 1; see Felker v. Turpin, 518 U.S. 651, 667 (1996) (Souter, J., joined by Stevens and Breyer, JJ., concurring) (questioning whether Congress could limit the Court's appellate jurisdiction if it meant that the Court could not review "divergent interpretations" in lower federal courts of federal statutes); see also James E. Pfander, Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals, 78 Tex. L. Rev. 1433, 1441–42 (2000) (arguing that "supreme courts" historically control "inferior" courts through use of the prerogative writs); James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 Colum. L. Rev. 1515, 1535 (2001) (semble). For some reason, Professor Pfander confines his view to Supreme Court review of federal actions. If he is correct, it cannot be so limited. See Hart & Wechsler, supra note 27, at 315 (extending Professor Pfander's discussion to the state court context).

240. See Hart & Wechsler, supra note 27, at 337–42 (discussing, inter alia, United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)).

241. Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 26 (1975). Professor Ely has often spoken to me of his admiration for Old Ezra and has very kindly inquired as to his health. Professor Fallon is also acquainted with Old Ezra. See Richard H. Fallon, Jr., Judicial Legitimacy and the Unwritten Constitution: A Comment on Miranda and Dickerson, 45 N.Y.L. Sch. L. Rev. 119, 133 (2001) [hereinafter Fallon, Judicial Legitimacy]. Indeed, his work is permeated with Old Ezra's emphasis on the importance of the lessons from history, experience, and practice. I confess that I do not remember who first introduced me to this grand old fellow.

than upon soaring constitutional theory.[242] But in this Article I do not wish to impress a unity and clarity upon the historical materials that they will not bear. Nor, of course, can I claim to be familiar with the entire universe of potentially relevant precedent. And finally, any student of the Court's decisions will be aware of "the oscillation of the Justices in reviewing the state law issues—sometimes engaging in de novo review, sometimes in limited review, and sometimes deferring altogether."[243] For my purposes, however, it suffices to point to the impressive historical support that exists for the independent judgment rule as the *ultimate* measure of Supreme Court jurisdictional authority over state-court determinations of state law in federal cases. History may not have the final say,[244] but (perhaps) it can illuminate the debate. Here, we principally examine four lines of authority: (a) the now long forgotten treaty cases, one of which is mentioned in a passing footnote in the Chief Justice's opinion in *Bush v. Gore* and distinguished by Justice Ginsburg as involving exceptional circumstances;[245] (b) the Contract Clause cases, not mentioned by the Chief Justice although they provide some of the best examples of penetrating reexamination of state law; (c) a criminal retroactivity case decided only a few weeks after *Bush v. Gore*; and (d) a brief discussion of decisions involving the adequate state ground doctrine itself.

This examination is best prefaced by recalling the early limitations imposed by statutes and practices governing Supreme Court review of state-court judgments. Four points about section 25 of the Judiciary Act of 1789[246] and its successors, now partially lost to memory, should be kept in mind. First, until 1914, the statutes reached only state-court judgments *denying* federal claims.[247] Second, review was by writ of error. Unlike

---

242. As Holmes put it, "a page of history is worth a volume of logic." N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). To the best of my knowledge he never met Justice Holmes, but I am sure that Old Ezra would heartily endorse these sentiments.

243. Hart & Wechsler, supra note 27, at 541. The authors preface this observation with, "How do you explain . . . ?" Id.

244. Professor Fallon rightly observes that no amount of tales told by Old Ezra can itself yield a theory. See Fallon, Judicial Legitimacy, supra note 241, at 133. Nor, of course, can logic. As Judge Barak recently put it, "The life of the law is complex. It is not mere logic. It is not mere experience. It is both logic and experience together." Aharon Barak, The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv. L. Rev. 16, 29–30 (2002); see also Oliver Wendell Holmes, Jr., The Common Law (Boston, Little, Brown 1881) (discounting the importance of logic in the development of the common law).

245. Bush v. Gore, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring); id. at 139–40 (Ginsburg, J., dissenting).

246. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (current version at 28 U.S.C. § 1257 (2000)), quoted in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 592–93 (1874).

247. See *Murdock*, 87 U.S. (20 Wall.) at 626 ("[I]t is only upon the existence of certain questions in the case that this court can entertain jurisdiction at all. . . . It must have been decided in a certain way, that is, against the right set up under the Constitution, laws, treaties, or authority of the United States."); Hartnett, Protecting, supra note 135, at 922–32 (describing origins of the 1914 Act, and arguing—quite implausibly, I believe, and

appeal (where all questions of law, fact, and discretion were open), writ of error review was ostensibly quite narrow: It reached only errors of federal law apparent on the face of the record.[248] Third, until *Murdock v. City of Memphis*, state court opinions were not part of the official record under review, a fact no doubt that significantly accounts for early Supreme Court decisions that make little or no reference whatsoever to them.[249] Fourth, and finally, section 25's final sentence had provided, "*But no other error shall be assigned* or regarded as a ground of reversal . . . than such *as appears on the face of the record*, and *immediately respects the before mentioned questions* of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute."[250] While the 1867 Act eliminated that sentence,[251] *Murdock*, over three dissents, held that Congress did not thereby intend to enlarge the Court's review over issues of state law.[252]

And so, were one to describe the formal properties of the framework established by section 25, one might suppose that the Court's review was restricted to the state court's interpretation of federal law. *Murdock* itself said that the "system [established by section 25] has been based upon the fundamental principle that this [Court's appellate] jurisdiction was limited to the correction of errors relating solely to Federal law."[253] That language, however, cannot be taken literally. From the very beginning, the Court regularly asserted "ancillary" jurisdiction to determine for itself

---

against decades of precedent—that state officials should not have the same access to Supreme Court review as private litigants); see also Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (codified as amended at 28 U.S.C. § 1257).

248. See, e.g., *Murdock*, 87 U.S. (20 Wall.) at 621–22, 624–25; Hill, supra note 71, at 955 n.43. This view is powerfully criticized in Robertson & Kirkham, supra note 143, § 97, at 175. The authors observe that the writ of error authorized by section 25 properly encompassed far more cases than did the common law writ and thus the ancient restrictions should not have been uncritically transposed to Supreme Court review. Id.

249. "[N]othing but the case, as presented by the record and pleadings of the parties, is considered, and the opinions of the court are never resorted to unless for the purpose of assisting this court in forming their own opinions." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 380 (1816) (Johnson, J., concurring). *Murdock* acknowledged the propriety of referring to the opinions of the state courts. 87 U.S. (20 Wall.) at 633–34. The Court noted that the 1867 Act had eliminated "the face of the record" language, and it invoked that development to give sanction to what had become the Court's increasing practice of looking to the state court opinions. Id.

250. Section 25, 1 Stat. at 86–87 (emphasis added).

251. Judiciary Act of 1867, ch. 28, § 2, 14 Stat. 385, 386–87.

252. 87 U.S. (20 Wall.) at 632–33. On the point of congressional intent, the decision is open to challenge, as Professor Warren long ago noted. 2 Charles Warren, The Supreme Court in United States History 682 (rev. ed. 1947). The deletion could be understood to have expressed a congressional fear that state law could be used to implement state court animosity to federal law. The Court itself noted this argument but rejected it on the basis of "eighty-five years of the administration of the law." *Murdock*, 87 U.S. (20 Wall.) at 632. Earlier, the Court noted that Congress had given the circuit courts specific forms of "arising under" jurisdiction to ensure adequate enforcement of federal law. Id. at 631; see also supra note 211.

253. *Murdock*, 87 U.S. (20 Wall.) at 630.

questions of law application and of adjudicative fact bearing on the claimed federal right or immunity.[254] More importantly here, as the fol-

---

254. In theory the writ of error precluded Supreme Court review of fact finding. See Egan v. Hart, 165 U.S. 188, 189 (1897) (holding that the "nature of a writ of error" and "the rulings of this court from the beginning, make it clear that on error to a state court . . . when the facts are found by the court below, this court is concluded by such findings"); John J. Gibbons, Federal Law and the State Courts 1790–1860, 36 Rutgers L. Rev. 399, 399 (1984) ("[T]he Supreme Court's appellate jurisdiction over state courts was limited to what was considered the bare minimum essential for the preservation of the supremacy of national law—review of state final judgments rejecting federal law claims."). But the Court regularly engaged in just such an enterprise. In *Fiske v. Kansas*, the Court said:

> [T]his Court will review the finding of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

274 U.S. 380, 385–86 (1927); cf. Davis v. Wechsler, 263 U.S. 22, 24 (1923) (holding state court findings of fact not conclusive). Writing in 1936, Robertson and Kirkham treated *Fiske* as stating the customary, not the exceptional, rule. Robertson & Kirkham, supra note 143, § 90, at 159–60. More recently, albeit no longer in the context of the formal limitations of a writ of error, the Court has emphatically asserted the power to make a quite extensive inquiry as to the historical facts bearing upon the federal claim. For two striking examples, see Cox v. Louisiana, 379 U.S. 536, 538–44 (1965) (reexamining adjudicative facts by selecting them from the evidence presented and arranging them in sequence) and Norris v. Alabama, 294 U.S. 587, 590 (1935) (holding that the Court may analyze the facts "whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former" (citations omitted)). For a general discussion, see Monaghan, Fact, supra note 26, discussing the extent of independent judgment appellate courts may exercise over adjudicative facts decisive of constitutional questions.

Here too, however, absent unusual circumstances, the usual practice is to accept state court conclusions with respect to facts if they have a reasonable evidentiary basis. Indeed, the language of deference is often used. See Miller-El v. Cockrell, 123 S. Ct. 1029, 1041 (2003) (reviewing decisions treating discriminatory intent in jury selection as a question of fact in which the state court decision is "accorded significant deference"). "Thus, despite the Court's authority to review state court findings of fact, in practice such findings are almost never disturbed." Hart & Wechsler, Fourth Edition, supra note 66, at 598; see also Hart & Wechsler, supra note 27, at 574 ("Cases in which the Supreme Court has in fact overturned state-court determinations of historical fact are extremely rare."). *Norris* and *Cox* were unusual cases. Nonetheless, the level of the Court's potential penetration of the factual record should not be ignored. "Justice Goldberg's majority opinion [in *Cox*] began with a factual recitation of what had occurred that was based not on state-court factfindings, but rather on his reading of the testimony in the record." Hart & Wechsler, Fourth Edition, supra note 66, at 603; see also Hart & Wechsler, supra note 27, at 578 ("The Supreme Court, when it considers a state court's application of federal legal standards to the facts as found, routinely engages in de novo review rather than deferring to the state court's determination.").

At least on one occasion, the Court asserted the same authority with respect to the factual underpinnings of *state law* grounds asserted to be adequate to support the state court judgment. In Ward v. Love County, 253 U.S. 17 (1920), carefully, albeit unsympathetically, examined in Fitzgerald, supra note 17, at 125–29, the state court held that members of an Indian tribe had "voluntarily" paid contested taxes and that such payment precluded a suit to recover the taxes. The Supreme Court apparently understood

lowing pages demonstrate, the same kind of review was applied to state-court determinations of state law. Characterization of state law,[255] it should be emphasized, was not the central issue. Rather, the Court examined the legal materials properly before the state court and determined for itself what the state law was at the constitutionally relevant point in time.[256]

1. *Treaty Cases.* — Now long forgotten, litigation arising out of the Revolutionary War provides the earliest example of the independent judgment rule.[257] Unsurprisingly, the new Americans were far from anxious to pay their debts to English subjects, or, more importantly here, to return land that they had acquired during and after the war.[258] Article VI of the 1783 Treaty of Peace provided that "there shall be no future confiscations made" of property held by British subjects.[259] The 1794 Jay Treaty added:

---

the state court's determination to be one of fact, and it concluded, contrary to the state supreme court, that the payments were not voluntary and that the state court fact finding did not rest upon fair or substantial support: "The facts set forth in the petition, all of which were admitted by the demurrer . . . make it plain, as we think, that the finding or decision that the taxes were paid voluntarily was without any fair or substantial support." *Ward*, 253 U.S. at 23. The Court cited no state-court case law. No Oklahoma decisions were examined, and the state court's ruling had precedential support. Bd. of Comm'rs v. Ward, 173 P. 1050, 1051 (Okla. 1918). Contrary to Professor Fitzgerald, I see nothing that could be characterized as "vehemently nationalist" in the Court's decision. Fitzgerald, supra note 17, at 126 n.189. The Court could have (and perhaps should have) disposed of the issue on straight preemption grounds: The state rule with respect to what constituted a voluntary payment was so harsh that it was incompatible with the federal tax immunity. The case was not about the facts; they simply exemplified the draconian effects of the substantive rule. In ordinary practice, however, we see the same pattern: the assertion of a sweeping power to reexamine findings by the state court, but a day-to-day practice that is far less intrusive.

255. See supra Part II.A.

256. That pattern of review did not contravene the last sentence of section 25. No textual reason exists as to why issues of fact and of state law cannot "immediately respect[ ] the before mentioned [federal] questions." Judiciary Act of 1789, ch. 2, § 25, 1 Stat. 73, 86–87 (current version at 28 U.S.C. § 1257 (2000)).

257. In *Bush v. Gore*, the Chief Justice obliquely mentions *Martin v. Hunter's Lessee* in a footnote. 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring). Justice Ginsburg viewed the decision as a product of unusual times. Id. at 139–40 (Ginsburg, J., dissenting).

258. See Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1438–49 (1989), which provides an exhaustive account of the American hostility to their British and Glasgow creditors before, during, and after the Revolutionary War. While the Constitution permitted alienage jurisdiction, the Judiciary Act of 1789 rendered access to the federal courts difficult. Id. at 1487–88. After 1787, Professor Holt claims, northern state hostility against foreign creditors had significantly abated. Id. at 1450–52.

259. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art. VI, 8 Stat. 80, 83. Article IV provided that "creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Id. at 82. Article V required that loyalists who had fought against the United States should be given a year to return to the United Kingdom "unmolested in their

> British subjects who now hold lands in the territories of the United States . . . shall continue to hold them . . . and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens.[260]

This additional guarantee was important because alien land title was generally subject to uncompensated sovereign defeasance.[261] The two treaties were understood to provide federal protection for property interests created by and existing under state law. On review of state court judgments, the Supreme Court regularly exercised independent judgment on the content of state law at time t_1, i.e., when that law was asserted to bar the claimant's treaty-based claims.

At issue in *Smith v. Maryland*[262] was whether the state had confiscated certain property (land title held by a Maryland resident in trust for an English subject) before the 1783 treaty had become effective. After extensive briefing, the Court concluded that the merits "must depend upon the true construction of" two 1780 Maryland acts.[263] Although holding that the land had been confiscated prior to the effective date of the treaty, the Court accorded no weight to the fact that the Maryland courts had so held.[264] At the beginning of its opinion, the Court rejected a challenge to its appellate jurisdiction:

> It is contended, by the defendants in error, that the question involved in the cause turns exclusively upon the construction of the confiscation laws of the state of Maryland, passed prior to the treaty of peace, and that no question, relative to the construction of that treaty, did or could occur. That the only point in dispute was, whether the confiscation of the lands in controversy was complete, or not, by the mere operation of those laws, without any further act to be done.[265]

---

endeavours to obtain the restitution of such of their estates, rights and properties, as may have been confiscated." Id.

260. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., art. IX, 8 Stat. 116, 122.

261. See infra notes 272–275 and accompanying text.

262. 10 U.S. (6 Cranch) 286 (1810).

263. Id. at 305. Chapter 45 of the Act of October 1780, declared that "all property within this state (debts only excepted), belonging to British subjects, shall be seized, and is hereby confiscated to the use of this state." Act of October 1780, ch. 45 (quoted in 10 U.S. (6 Cranch) at 288 (internal quotation marks omitted)). This Act was deemed by the Maryland courts to put Maryland commissioners "in possession of all British property, within the limits of the state, under and by virtue of the act of confiscation." 10 U.S. (6 Cranch) at 288 (citing the findings of the state trial court). The subsequent Act appointed commissioners.

264. A writ of error had been issued "to the Court of Appeals of the state of Maryland, being the highest court of law and equity in that state, which affirmed the decree of the chancellor of Maryland. The facts of the case appear to be correctly stated in the decree of the chancellor . . . ." 10 U.S. (6 Cranch) at 286.

265. Id. at 304.

Responding in elaborate fashion, the Court asserted a theory of ancillary jurisdiction over the antecedent state law claim:

> This argument proves nothing more than that the whole difficulty in this case depends upon that part of it which involves the construction of certain state laws, and that the operation and effect of the treaty, which constitutes the residue of the case, is obvious, so soon as that construction is settled. . . . The point to be decided was and is, whether this be a case of future confiscation, within the meaning of the 6th article of that treaty ; [sic] and in order to arrive at a correct result in the decision of that point, it became necessary, in the state court, and will be necessary in this, to inquire whether the confiscation, declared by the state laws, was final and complete, at the time the treaty was made, or not? The construction of those laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty.[266]

Far more dramatic from an historical perspective was the litigation arising out of a vast tract of land in Northern Virginia, which resulted in Supreme Court opinions in *Fairfax's Devisee v. Hunter's Lessee*[267] and *Martin v. Hunter's Lessee*.[268] In *Fairfax*, the Court reversed a two-judge decision of the Virginia Supreme Court of Appeals. Both Virginia judges had agreed that a legislative act of compromise, passed in 1796, was dispositive with respect to the competing land claims.[269] That act, however, was not mentioned in the *Fairfax* opinion, perhaps because the state court opinions were not part of the record, and the act itself seems not to have been mentioned in the elaborate agreed-upon statement of facts[270] or in the arguments of counsel.[271] Otherwise, the state-court judges had di-

---

266. Id. at 304–05. The Court continued:

> [I]t is perfectly immaterial to the point of jurisdiction, that the first part of the way is the most difficult to explore. . . . [I]f, according to the true construction of the state laws, this court should be of opinion, that the acts of confiscation left something to be done, necessary to the perfection of the title claimed under them, which was not done, at the time the treaty was made, we must say that, in this case, the construction of the treaty was drawn in question, and that the decision of the state court was against the right set up, under the treaty, by one of the parties.

Id. at 305.

267. 11 U.S. (7 Cranch) 603 (1813). This was the decision referred to by Chief Justice Rehnquist and Justice Ginsburg in *Bush v. Gore*. 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring); id. at 139–40 (Ginsburg, J., dissenting).

268. 14 U.S. (1 Wheat.) 304 (1816). For a lucid description, see Hart & Wechsler, supra note 27, at 469–83.

269. Hunter v. Fairfax's Devisee, 15 Va. (1 Munf.) 218, 231–32, 237–38 (1810).

270. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 604–12.

271. Id. at 612–17. In *Martin v. Hunter's Lessee*, the Court did refer to the Act of Compromise and, disagreeing with the concurring opinion in the court below, *Hunter*, 15 Va. (1 Munf.) at 237–38 (opinion of Fleming, J.), brushed it aside as lacking dispositive significance:

> If it be true (as we are informed) that this was a private act, to take effect only upon a certain condition . . . which was matter *in pais*, it is somewhat difficult to

vided on issues of state law.[272] Speaking for the Court, Justice Story intensely scrutinized state law, particularly the various acts of the Virginia legislature specifically addressed to Northern Neck. He concluded that no Virginia statute had altered the common law rules governing the divestiture of an alien's title (which required an inquest of office) before the protection of the 1794 treaty had attached.[273] He implicitly rejected the argument that no federal issue was presented because the status of the alien's title prior to 1794 presented an issue solely of state law; indeed, his opinion did not address this argument: "So completely did Judge [sic] Story accept the principle of Supreme Court review of State-court determinations limiting the right to qualify for an appeal under the treaty supremacy clause, that he did not mention the *Smith v. Maryland* precedent in this connection."[274] Justice Johnson dissented on the state law issue.[275]

> understand how the court could take judicial cognizance of the act, or of the performance of the condition, unless spread upon the record. At all events, we are bound to consider that the court did decide upon the facts actually before them.

Martin, 14 U.S. (1 Wheat.) at 360.

272. Speaking for himself alone, Judge Roane concluded that the alien owner held only a defeasible title that had vested in the Commonwealth by an act of 1782. *Hunter*, 15 Va. (1 Munf.) at 230 (citing Act of 1782, ch. 8, § 24). Judge Fleming disagreed, and he insisted that the legislature must be explicit if it intends to substitute new means of confiscation for the method existing at common law. Id. at 233–34.

273. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 618–28. Justice Story began by investigating the title of Lord Fairfax and said that at his death in 1781 Lord Fairfax "had the absolute property of the soil of the land in controversy." Id. at 619. "The next question is, as to the nature and character of the title which Denny Fairfax took by the will of Lord Fairfax, he being, at the time of the death of Lord Fairfax, an alien enemy." Id. Justice Story next followed with an examination of the title of an alien. While the sovereign could take title, he said, "this title could only be divested by an inquest of office, perfected by an entry and seizure, where the possession was not vacant." Id. at 622. He concluded:

> It was once in the power of the commonwealth of Virginia, by an inquest of office or its equivalent, to have vested the estate completely in itself or its grantee. But it has not so done, and its own inchoate title (and of course, the derivative title, if any, of its grantee) has, by the operation of the treaty, become ineffectual and void.

Id. at 627.

274. 2 George L. Haskins & Herbert A. Johnson, The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States 555 (Paul A. Freund ed., 1981). Justice Johnson did address the jurisdictional issue.

> I am also of opinion that whenever a case is brought up to this Court under that section, the title of the parties litigant must necessarily be enquired into, and that such an enquiry must, in the nature of things, precede the consideration how far the law, treaty, and so forth, is applicable to it; otherwise an appeal to this Court would be worse than nugatory.

Fairfax's Devisee, 11 U.S. (7 Cranch) at 632 (Johnson, J., dissenting).

275. For him, *Smith* had settled the question "whether it was not competent for the state to assert its rights over the alien's property, by any other means than an inquest of office." *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 631 (Johnson, J., dissenting). And the legislative grant of title issued to the plaintiff was sufficient to transfer title. Id. The Court

Martin v. Hunter's Lessee squarely rejected the argument "that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the court of appeals." Justice Story wrote:

> If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against *the title set up by the party*. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction.[276]

He added:

> How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it had legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title.[277]

Justice Ginsburg sought to isolate the treaty cases on the ground that the Court intervened in an atmosphere of state hostility to the content of federal law.[278] Perhaps so.[279] But the fact remains that the Court believed that, in appropriate circumstances, its appellate jurisdiction extended to an independent determination of state law. If perceived hostil-

---

itself did not claim "that it was not competent for the legislature (supposing no treaty in the way) by a special act to have vested the land in the commonwealth without an inquest of office for the cause of alienage." Id. at 622.

276. *Martin*, 14 U.S. (1 Wheat.) at 357–58. He added:

> The restraining clause was manifestly intended for a very different purpose. It was foreseen that the parties might claim under various titles, and might assert various defences, altogether independent of each other. The Court might admit or reject evidence applicable to one particular title, and not to all, and in such cases it was the intention of Congress to limit what would otherwise have unquestionably attached to the Court, the right of revising all the points involved in the cause. It therefore restrains this right to such errors as respect the questions specified in the section; and in this view, it has an appropriate sense, consistent with the preceding clauses. We are, therefore, satisfied, that, upon principle, the case was rightfully before us, and if the point were perfectly new, we should not hesitate to assert the jurisdiction.

Id. at 359.

277. Id. at 358.

278. Bush v. Gore, 531 U.S. 98, 139–40 (2000) (Ginsburg, J., dissenting).

279. Southern states were particularly hostile to efforts by British creditors to collect their debts or recover their property. See supra note 258.

ity to federal law justifies such a penetrating examination of state law, other occasions might also.

2. *Contract Clause Cases.* — The treaty cases have long receded from the active memory of the legal profession. For most lawyers, the Contract Clause cases provide the most familiar examples of the Supreme Court's independent review of state-court determinations of state law. Article I, Section 10, Clause 1 prohibits states, inter alia, from passing any "Law impairing the Obligation of Contracts."[280] Construction and implementation of that Clause was an important staple of the Court's business until the end of the nineteenth century,[281] when it was overtaken by litigation involving the more inclusive notion of substantive due process associated with *Lochner v. New York*[282] and its progeny.

Many of the Court's cases turned not on the question of whether the state legislation impaired the contract, but rather upon the antecedent question of whether a contractual obligation had existed. In these cases, the state court frequently gave effect to the allegedly impairing legislation by denying that a contract had existed, often through its interpretation of a prior state statute.[283] Such determinations did not prevent Supreme Court review of the state court's decision on what the state law was prior to application of the allegedly impairing legislation. "It is well established doctrine that where the contract clause is invoked *this Court must determine for itself the nature and effect of the alleged agreement* and whether this has been impaired."[284] The issue in these cases is not one of characterization, where the question is whether a given transaction is a "contract" within the meaning of the Contract Clause, notwithstanding its state law

---

280. U.S. Const. art. I, § 10, cl. 1.

281. Siegel, supra note 73, at 3–4 & n.2 ("Before 1889, 40% of the cases contesting the validity of state legislation involved the contract clause."); Wright, supra note 81, at xiii, 91–97 ("During the nineteenth century, no constitutional clause was so frequently the basis of decisions by the Supreme Court of the United States as that forbidding the states to pass laws impairing the obligation of contracts.").

282. 198 U.S. 45 (1905); see Herbert Hovenkamp, Enterprise and American Law: 1836–1937, at 17 (1991) (noting decline in Contract Clause claims in favor of due process claims); Wright, supra note 81, at 92 (stating that, "partly because of the greater scope and flexibility of the expanded due process clause, [the Contract Clause] ceased to be the bulwark of vested interests and came to be a clause of distinctly secondary importance").

283. "As in most cases brought to this court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it." Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938).

284. United States Mortgage Co. v. Matthews, 293 U.S. 232, 236 (1934) (emphasis added) (citations omitted); see also Rogers v. Alabama, 192 U.S. 226, 230 (1904) (Holmes, J.) (describing, in non-Contract Clause case, the principle that "[i]t is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired," as illustrative of a broader proposition (citation omitted)); West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28–29 (1951) (reversing a state court construction of its constitution that had rendered void the state's participation in a congressionally approved interstate contract and analogizing the Court's authority in this area to its power under the Contract Clause).

significance. Here, the Court is determining for itself the existence of a contract by examining de novo the relevant state law legal materials.

An early exposition of the independent judgment rule in Contract Clause cases came in a series of decisions stemming out of the state of Ohio's attempts to increase by statute the rate of taxation of a state chartered bank. *Piqua Branch v. Knoop* reversed a decision of the Ohio Supreme Court that an earlier statute had not created a contract binding on the state legislature, stating that "whilst we have all the respect for the learning and ability which the opinions of the judges of the Supreme Court of the State command, we are called upon to exercise our own judgments in the case."[285] To do otherwise, the Court noted, "would be to surrender one of the most important provisions of the federal Constitution."[286] Addressing a similar issue eleven years later in *Jefferson Branch Bank v. Skelly*,[287] the Court elaborated upon the necessity for independent judgment:

> Of what use would the appellate power be to the litigant . . . if this court could not decide, *independently of all adjudication by the Supreme Court of a State*, whether or not the phraseology of the instrument in controversy *was expressive of a contract* and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion . . . .[288]

Nor was the Supreme Court's exercise of independent judgment reserved exclusively for those cases in which the state court decision denying the existence of a contract was simply a pretext for giving effect to the allegedly impairing legislation. As Professor Hill observed, "the scope of the [Court's] review of the state decision on [the] threshold questions [of the existence and scope of the contract] was quite broad, especially in earlier cases; it was not limited to a search for 'error' so outrageous as to suggest willful evasion of the claim of impairment."[289]

The independent judgment rule in Contract Clause cases assumed textbook status.[290] The line it has followed has not been a straight one,

---

285. Piqua Branch of the State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 392 (1854).

286. Id.

287. 66 U.S. (1 Black) 436 (1861).

288. Id. at 443 (emphasis added).

289. Hill, supra note 71, at 957.

290. Robertson & Kirkham, supra note 143, § 93, at 165–66. Robertson and Kirkham state:

> [I]t is well settled that in cases arising under this clause the Supreme Court determines for itself whether there is a contract and what are its terms. . . . [T]he Supreme Court is not limited, in determining what effect, if any, has been given

however. Deference language increasingly appeared, particularly as the Court's interest in protecting the Clause's substantive values waned. Sometimes, the deference language is that of *Skidmore*.[291] On other occasions, however, the language suggests *Chevron* deference: "[W]e . . . accept [the state court's] judgment as to [the existence and meaning of a contract] unless manifestly wrong."[292] Still, albeit sometimes informed by *Skidmore* deference, the independent judgment rule can be found in numerous opinions. *Indiana ex rel. Anderson v. Brand*[293] is a well-known example. There, the Court overturned a state-court holding denying the existence of a contract, stating:

> On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, im-

---

> to the subsequent statute, to a mere consideration of the language of the opinion of the state court, but will determine for itself [giving due deference to the state court's views] whether the subsequent statute was an essential, although unmentioned, element of the decision under review.

Id. The bracketed language was inserted in the Wolfson and Kurland edition. Reynolds Robertson & Francis R. Kirkham, Jurisdiction of the Supreme Court of the United States § 100, at 182 (Richard F. Wolfson & Philip B. Kurland eds., Matthew Bender & Co. 1951) (1936); see also Wright, supra note 81, at 80 ("The Supreme Court has reserved to itself the final authority to determine whether a contract existed, the nature of its obligations, and whether a state law has impaired these obligations."); Robert L. Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 852 (1944) ("When determining whether an obligation was such that a subsequent statute impaired it, the Supreme Court has never felt bound to follow state decisions.").

291. E.g., Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) ("We 'accord respectful consideration and great weight to the views of the State's highest court,' though ultimately we are 'bound to decide for ourselves whether a contract was made.'" (quoting Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938))); Higginbotham v. City of Baton Rouge, 306 U.S. 535, 538–39 (1939) ("While this Court in applying the contract clause of the Constitution must reach an independent judgment as to the existence and nature of the alleged contract, we attach great weight to the views of the highest court of the State." (citations omitted)); Appleby v. City of New York, 271 U.S. 364, 379–80 (1926) ("Of course we should give all proper weight to [the state court's] judgment, but we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration."); Columbia Ry., Gas & Elec. Co. v. South Carolina, 261 U.S. 236, 246–47 (1923) ("We accord to [the state court's] ruling the respect which we must always give to the decisions of an appellate tribunal of a State . . . .").

292. Hale v. State Bd. of Assessment & Review, 302 U.S. 95, 101 (1937); see also, e.g., Atl. Coast Line R.R. Co. v. Phillips, 332 U.S. 168, 170 (1947) (noting that, on matters of local policy, the Court "should be slow to depart from [the state court's] judgment, if there was no real oppression or manifest wrong in the result" (quoting New York ex rel. Clyde v. Gilchrist, 262 U.S. 94, 97 (1923))); Phelps v. Bd. of Educ., 300 U.S. 319, 322–23 (1937) ("This court is not bound by the decision of a state court as to the existence and terms of a contract . . . [but u]nless [the state court's] views are palpably erroneous we should accept them.").

293. 303 U.S. 95 (1938).

> paired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts.[294]

The Court then undertook a very extensive analysis of the Indiana statutes and case law, precisely the kind of analysis that one would expect to find, not in the Court's reports, but in the Indiana law reports.[295] Similarly, in *Appleby*, although the Court recognized that the state court's judgment should be given "proper weight," it was careful to point out that the Supreme Court "must give [its] own judgment derived from [state statutes and decisional law] and not accept the present conclusion of the state court without inquiry."[296] The Court then embarked upon an examination of New York law that covered over twenty pages of the United States Reports![297]

The extensive litigation during and after the Civil War arising from county and municipal defaults on ill-advisedly issued railroad bonds provides perhaps the best known example of the Court's disregard of state court construction of state law.[298] The cases, however, do not provide support for the independent judgment rule. This litigation teaches us

---

294. Id. at 100 (footnote omitted).

295. Id. at 100–09.

296. *Appleby*, 271 U.S. at 379–80.

297. Id. at 381–402. For additional examples of cases in which the Supreme Court has employed deference language while nonetheless conducting a searching inquiry into state law, see Gen. Motors Corp. v. Romein, 503 U.S. 181, 187–91 (1992) (characterizing review in terms evoking *Skidmore* deference and affirming state court decision, but engaging in extensive review of state law in determining existence of a contract); Columbia Ry., Gas & Electric Co. v. South Carolina, 261 U.S. 236, 247–51 (1923) (invoking *Skidmore*-style deference, but independently determining content of state statutes in question and reversing state supreme court decision); see also text accompanying notes 75–76 (discussing *Romein* as an independent judgment case). Justice Ginsburg, emphasizing its deference language, cites *Romein* as a true deference case. Bush v. Gore, 531 U.S. 98, 137 (2000) (Ginsburg, J., dissenting). I believe that the deference language used was (if at all meaningful) *Skidmore* deference.

298. The classic account of this litigation is contained in 6 Charles Fairman, History of the Supreme Court of the United States 918–1116 (1971) [hereinafter Fairman, History]. In this litigation the Court's "zeal was directed toward protecting the bondholder if he, or any predecessor in title, had bought without actual knowledge of invalidity." Id. at 921. In a well-known letter to his brother-in-law, Justice Miller characterized the majority of the Court as "fanatics on that subject." He added, "In four cases out of five the case is decided when it is seen by the pleadings that it is a suit to enforce a contract against a city, or town, or a county. If there is a written instrument its validity is a forgone conclusion." Letter from Samuel Freeman Miller to William Pitt Ballinger (Feb. 3, 1878), quoted in Charles Fairman, Mr. Justice Miller and the Supreme Court, 1862–1890, at 232 (1939) [hereinafter Fairman, Miller]; see also Fairman, History, supra, at 920.

Professor Freyer cites estimates that the total of the defaulted bonds was between $100 and $150 million, and that some 300 bond cases reached the Supreme Court during the last third of the century. Tony Freyer, Harmony & Dissonance: The *Swift* & *Erie* Cases in American Federalism 60 (1981). The litigation was, as Professor Fairman wrote, "a phase of the great struggle between farmers and taxpayers on the one hand and railroad promoters and investors on the other. The Supreme Court threw its support on the side of the latter groups by a somewhat violent assertion of federal judicial power." Fairman, Miller, supra, at 207.

that disregard of state judicial decisions is not necessarily the equivalent of redetermining state law. State law was not redetermined by the Court; it was simply irrelevant.

Many of the cases reached the Court on the basis of diversity jurisdiction in the lower federal courts,[299] thereby falling within the domain of *Swift v. Tyson*,[300] which allowed the Court to disregard state law in favor of principles based upon the "general" law.[301] In a number of these cases, the Court, while perhaps appearing to be engaged in an independent interpretation of state law, simply avoided giving effect to the statutory language by reading into the statutes general principles of commercial law.[302] Thus, they are merely relics of the pre-*Erie* era, and provide no support for the independent judgment rule.

---

299. Fairman, History, supra note 298, at 918. General "arising under" jurisdiction did not exist in the federal courts until 1875, Act of Mar. 3, 1875, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (2000)), and even then, it seemed that the contract right of action accrued under state law, the Contract Clause operating only to negative state defenses.

300. 41 U.S. (16 Pet.) 1 (1842).

301. Under *Swift*, state law was not redetermined; it was simply not determinative in diversity cases governed by principles of general law. See id. at 19 (holding that the rule that state law was binding on federal courts in diversity cases was "strictly limited to local statutes and local [customs]" and that, in deciding questions involving "contracts and other instruments of a commercial nature," the Court would look to "general principles and doctrines of commercial jurisprudence").

302. In these cases, the Court repeatedly upheld the validity of bonds in the face of challenges alleging (in all probability, quite correctly) that no contract had been formed because of fraud or a failure in fact to comply with statutory conditions. It refused to allow previously-issued bonds to be invalidated on these grounds, and instead read into the state statutes a general principle that municipal officers were required to decide, prior to the issuance of the bonds, whether the statutory preconditions had been complied with. Once this had been done and the bonds had been issued, the initial determination of compliance was conclusive and binding upon the municipality. E.g., Town of Coloma v. Eaves, 92 U.S. 484, 488–93 (1875); Comm'rs of Knox County v. Aspinwall, 62 U.S. (21 How.) 539, 544–46 (1858). Decisions such as these came about in part because the Court decided for itself that most of the bonds were negotiable instruments in Mercer County v. Hackett, 68 U.S. (1 Wall.) 83, 95–96 (1863), decided a few weeks after Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863).

The Court also disregarded state court holdings that taxes could not be levied to pay off municipal bonds because issuance of railroad bonds contravened the "first and most fundamental maxim of taxation." Fairman, History, supra note 298, at 1010–14 (quoting People ex rel. Detroit & Howell R.R. v. Township Bd., 20 Mich. 452, 494 (1870)) (internal quotations marks omitted). In a subsequent case, the Supreme Court refused to follow the Michigan court's decision, which had been written by the esteemed Judge Cooley, concluding that the state court simply got its "first principles" wrong. "With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. . . . The question before us belongs to the domain of general jurisprudence . . . [and] this court is not bound by the judgment of the courts of the States where the cases arise." Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 677 (1873); see also Olcott v. Supervisors, 83 U.S. (16 Wall.) 678, 690 (1872) (disregarding Wisconsin Supreme Court decision interpreting the state constitution and stating that "[t]he nature of taxation, what uses are public and what are private, and the extent of . . . legislative power, are matters which, like questions of commercial law, no

Other decisions appear more troubling. Even under *Swift*, state court construction of state statutes and constitutional provisions bound federal diversity courts.[303] No doubt because of its extreme language, *Gelpcke v. City of Dubuque* remains the most notorious example of the Court disregarding that principle.[304] Overruling a prior decision by a divided court, the Supreme Court of Iowa had held that a statute authorizing the issuance of certain bonds violated the state constitution.[305] The Court refused to follow the new decision. "We shall never immolate truth, justice, and the law," said the Court, simply "because a State tribunal has erected the altar and decreed the sacrifice."[306] At times, the Court appears to have believed that its interdiction of judicial retroactivity invalidating bonds was an interpretation of the Contract Clause itself.[307] But the Court later expressly disavowed that proposition because

---

State court can conclusively determine for us"). In *Olcott*, the Court noted that the earlier state court decision had not relied upon any specific provision of the state constitution, and was not, therefore, a decision of state constitutional interpretation or construction. Id. at 689.

303. See *Swift*, 41 U.S. (16 Pet.) at 18 (holding that the word "laws" in the Rules of Decision Act meant primarily statutes); see also Leffingwell v. Warren, 67 U.S. (2 Black) 599, 603 (1862) ("If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this Court will follow the latest settled adjudications."); Green v. Lessee of Neal, 31 U.S. (6 Pet.) 291, 295–301 (1832) (holding that the Supreme Court will abandon its own prior construction of a state statute in deference to a subsequent decision of the state supreme court).

304. *Gelpcke*, 68 U.S. (1 Wall.) at 205–06.

305. Professor Fairman points out that the overruled state court precedent was of a decidedly wobbly nature. Fairman, History, supra note 298, at 940–42.

306. *Gelpcke*, 68 U.S. (1 Wall.) at 206–07. Justice Miller dissented, claiming that the decision was "a usurpation of the right, which belongs to the State courts, to decide as a finality upon the construction of State constitutions and State statutes." Id. at 220 (Miller, J., dissenting).

307. In *Gelpcke*, Justice Swayne wrote:

> "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law."
>
> The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere.

Id. at 206 (quoting Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 432 (1854) (Taney, C.J.)). Further, subsequent bond decisions understood *Gelpcke* as holding that state court decisions altering the settled understanding of state law could trigger the Contract Clause. In Township of Pine Grove v. Talcott, for example, the Court said that the impairment could be accomplished "no more by judicial decisions than by legislation," 86 U.S. (19 Wall.) at 678, and in Douglass v. County of Pike, the Court said that the "settled" construction of a statute becomes, for Contract Clause purposes, "as much a part of the statute as the text itself, and a change of decision is [equivalent to] an amendment of the law by means of a legislative enactment," 101 U.S. 677, 687 (1879).

Professor Fairman observes that, in contrast to Contract Clause cases involving the independent judgment rule, "the [*Gelpcke*] majority did not claim that the Court should exercise an independent judgment [on the content of state law]. The previous [state] rule

the Clause restrains only legislative, not judicial, conduct.[308] Attempting to make sense of the decision, Professor Fairman and other commentators read *Gelpcke* as freeing *Swift v. Tyson* from the general rule that the judicial constructions of state statutes bound federal diversity courts: "Gelpcke v. Dubuque and Swift v. Tyson worked as a team in the municipal bond cases."[309] If that is correct, the *Gelpcke* line of cases is another

---

was to be upheld, right or wrong." Fairman, Miller, supra note 298, at 214 n.20. But see Fairman, History, supra note 298, at 938 (stating that "[t]he Court's position in *Gelpcke* was that it had an independent judgment"). The *Gelpcke* opinion itself does, however, make clear that the Court viewed the overruling decision as reaching an incorrect result. *Gelpcke*, 68 U.S. (1 Wall.) at 205–06 ("The earlier decisions, we think, are sustained by reason and authority."). But, as Professor Thompson points out, "[T]his answer was not satisfactory. The *Gelpcke* approach applied regardless of the merits involved in the prior decisions." Barton H. Thompson, Jr., The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause, 44 Stan. L. Rev. 1373, 1421 (1992).

308. Both before and after *Gelpcke* the Court had held that the Clause's prohibition of "Laws" impairing the obligation of contract applied only to legislative, not judicial, conduct. Fairman, History, supra note 298, at 937. Referring to *Gelpcke*, Chief Justice Taft wrote, "Certain unguarded language in [it] and some other cases, has caused confusion, although those cases did not really involve the contract impairment clause of the Constitution." Tidal Oil Co. v. Flanagan, 263 U.S. 444, 454 (1924) (citations omitted); see also Thompson, supra note 307, at 1375, 1390 (stating that, since the early twentieth century, the Court has "consistently refus[ed] to constrain judicial decisions undermining contractual expectations"). Moreover, even immediately in the wake of *Gelpcke*, the Court refused for want of jurisdiction impairment challenges coming from the state courts that were premised on state-court overruling of prior precedent. E.g., R.R. Co. v. McClure, 77 U.S. (10 Wall.) 511, 515 (1871); R.R. Co. v. Rock, 71 U.S. (4 Wall.) 177, 181 (1867). *Hart & Wechsler* asks: "Suppose the question had come to the Supreme Court on review of the state court's overruling decision? Would the state's decision have been vulnerable to challenge under the Fourteenth Amendment or any other constitutional provision? If not, can the Gelpcke decision be defended?" Hart & Wechsler, supra note 27, at 626–27.

309. Fairman, History, supra note 298, at 939 n.78 ("Gelpcke v. Dubuque and Swift v. Tyson may be bracketed as cases where the Supreme Court asserted its independence of State Court rulings on State law."); see also Freyer, supra note 298, at 58–60 (characterizing *Gelpcke* as an extension of *Swift*). Not all commentators agree, however. See William H. Rand, Jr., Swift v. Tyson versus Gelpcke v. Dubuque, 8 Harv. L. Rev. 328, 345 (1895) ("To abide firmly by Swift v. Tyson the court should have considered neither local ruling as law, but only as evidence of the law. . . . This, however, is precisely what the court did *not* do."); Thompson, supra note 307, at 1417 ("[T]he early municipal bond cases . . . differed crucially from *Swift*. . . . From the standpoint of result, *Swift* permitted federal courts to independently determine the law for commercial transactions, while *Gelpcke* bound the Court to preexisting state case law.").

While the narrow holding of *Gelpcke* did bind the Supreme Court to the settled law for the state at the time the bonds were issued, and thus did not fully incorporate the *Swift* power to decide based on general principles of law, several subsequent cases did attempt to merge the doctrines of *Gelpcke* and *Swift* in the manner suggested by Professor Fairman. In *Butz v. City of Muscatine*, the Court, interpreting a state statute, stated that "[t]here are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them." 75 U.S. (8 Wall.) 575, 582 (1869). The Court continued:

> This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the State courts, which may have exercised their judgment upon the same subject. . . . We are of the opinion that

pre-*Erie* relic. State law is not redetermined; it is simply disregarded because it is irrelevant.

Nonetheless, the decisions have some pertinence here. Neither *Swift* nor *Lessee of Neal* involved review of state law antecedent to a federal claim. Thus the question is whether the problem in *Gelpcke* should be framed differently. The Court correctly looked to state court statutes and judicial opinions to determine for itself whether, *when issued* (t_1), the bonds constituted valid contracts, and if so, their terms.[310]

3. *Retroactivity in Criminal Cases.* — Retroactivity challenges to state criminal convictions present another area in which the Court has demonstrated a willingness to engage in an extensive examination of what the state law was at a given point in time. In *Rogers v. Tennessee*,[311] the Court once again stated that (like its companion, the Contract Clause) the Ex Post Facto Clause restricts only legislative retroactivity. Judicial retroactivity is restrained by the Due Process Clause,[312] which forbids only "unexpected and indefensible" changes.[313] In *Rogers*, the Tennessee Supreme Court abrogated the "year and a day" rule of its common law of homicide. Application of this holding to the defendant, the state court held, did not deny due process because abrogation was foreseeable.[314] The Supreme Court affirmed, but only after undertaking an extensive review of the state law to show how weakly the year and a day rule had been rooted in state law.[315] Acknowledging the propriety of some such review, Justice Scalia's dissent argued that "[t]hough the Court spends some time ques-

---

> under the statutes of Iowa, in force when the contract was made, the relator is entitled to the remedy he asks, and that this right can no more be taken away by subsequent judicial decisions than by subsequent legislation.

Id. at 584; see also *Talcott*, 86 U.S. (19 Wall.) at 677 (disregarding state court interpretation of the state constitution and declaring that "[t]he question before us belongs to the domain of general jurisprudence . . . [and that in] this class of cases this court is not bound by the judgment of the courts of the States where the cases arise").

310. While judicial retroactivity does not raise impairment issues, judicial retroactivity must be measured against the now—but perhaps not then—more forgiving standards of substantive due process. The difficulty here, of course, is that substantive due process did not make its formal appearance in the Supreme Court as a basis for a decision of invalidity until 1890. See Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 456–58 (1890).

311. 532 U.S. 451 (2001).

312. Id. at 457–58.

313. Id. at 462. The severance of the connection between the Ex Post Facto and Due Process Clauses drew a sharp dissent from Justice Scalia. Id. at 469–71 (Scalia, J., dissenting). For similar criticism, see The Supreme Court, 2000 Term—Leading Cases, 115 Harv. L. Rev. 306, 321–22 (2001).

314. *Rogers*, 532 U.S. at 459, 462–66. The whole idea that the defendant was (or was not) "surprised" by the evolving trends in the criminal law throughout the nation is, of course, a massive fiction.

315. Id. at 462–67. The Court's examination of prior state law was at least as extensive as that undertaken by the state court. See State v. Rogers, 992 S.W.2d 393, 396–401 (Tenn. 1999). Justices Souter and Ginsburg, dissenters in *Bush v. Gore*, joined the Court's opinion without comment.

tioning whether the year and a day rule was ever truly established in Tennessee" the state court's "reasonable reading of state law by the State's highest court is binding upon us."[316] "Reasonableness" in this context is, of course, a synonym for "fair support."[317]

4. *Adequate Nonfederal Ground.* — Some of the best known illustrations of the independent judgment rule can be found in decisions discussing the adequate and independent state ground doctrine itself. The Court has rejected a proffered state procedural rule when the rule violated due process, when it was novel or had been erratically applied, or when the rule unduly burdened federal rights.[318] In *Bush v. Gore*, both

316. *Rogers*, 532 U.S. at 468–69; see also Smith v. Doe, 123 S. Ct. 1140, 1147 (2003), reh'g denied 123 S. Ct. 1925 (2003) (stating that sex registration statute is civil and thus the Ex Post Facto Clause is inapplicable and noting that the Court defers to the legislature's stated intent absent the "clearest proof" to the contrary).

317. Like the concurrence in *Bush v. Gore*, *Rogers* severed the statutory text from its interpretation. But unlike the Chief Justice's conclusion that the Florida court's statutory "interpretation" was unreasonable statutory interpretation, *Rogers* viewed the state court's abrogation of the year and a day rule not as an act of statutory interpretation but as an exercise in common law decisionmaking. Indeed, the Court seemed to go further, and to suggest that at least some judicial "interpretations" of a (criminal) statute are not acts of statutory interpretation, "where, as here, the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging." *Rogers*, 532 U.S. at 461. Instead they raise issues about the limits of common law decisionmaking. Id. at 461–62. This is how the Court explained *Bouie v. City of Columbia*. 378 U.S. 347 (1964); see *Rogers*, 532 U.S. at 461. *Bouie* also involved a redetermination of state law. The Court rejected the state construction of a state trespass law on the ground that it involved an expansion of liability that was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Id. (citation and internal quotation marks omitted). Viewing state court construction of background principles governing state statutes as essentially common law decisionmaking may be acceptable when the state law difference between that process and statutory "interpretation" is not only blurred but also consciously deemphasized. See Judith S. Kaye, State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions, 70 N.Y.U. L. Rev. 1, 29 n.164 (1995) (quoting Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 286 (1989), and Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593, 604 (1995)). Such a separation at the federal level is, however, quite problematic. *Rogers*, 532 U.S. at 459–60 (discussing, inter alia, Marks v. United States, 430 U.S. 188 (1977)). The Court has increasingly treated federal common law as a suspect enterprise, except within the narrowest range. E.g., Atherton v. FDIC, 519 U.S. 213, 217–26 (1997) ("[N]ormally, when courts decide to fashion rules of federal common law, 'the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.'" (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966))). Indeed, the Court has gone to rather startling lengths to cast its results as statutory interpretation rather than federal common law. See, e.g., Burlington Indus. v. Ellerth, 524 U.S. 742, 760–65 (1998) (creating an affirmative defense to a Title VII claim while insisting that the Court was engaged in statutory interpretation, not making federal common law).

318. I follow the excellent presentation in Hart & Wechsler, supra note 27, at 551–65, which in turn is based upon Daniel A. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128 (1986). In an earlier study, Professor Hill denied that undue burdens constituted a legitimate basis for disregarding state law. Hill, supra note 71, at

the Chief Justice and Justice Ginsburg referred to *NAACP v. Alabama ex rel. Patterson*.[319] There, the Court carefully examined state law and concluded that the state court had applied a novel procedural rule to bar consideration of federal challenges to a trial court's contempt finding.[320] *Lee v. Kemna*[321] is the most recent example. A state appeals court had upheld a trial court's denial of an oral motion for a continuance challenged on due process grounds because state procedural rules required that such motions be in writing and supported by an affidavit. Justice Ginsburg's majority opinion acknowledged that violation of regularly followed state procedural rules ordinarily sufficed to foreclose federal review. However, "exceptional cases [exist] in which exorbitant application of a generally sound rule renders the state ground inadequate . . . . This case fits within that limited category."[322] She noted that petitioner had "substantially complied with" state law, and that a written motion would not have met the trial judge's reasons for denying the motion. Examining Missouri law, she rejected the state court's interpretation, stating that "no published Missouri decision directs flawless compliance with [the state rules] in the unique circumstances this case presents—the sudden, unanticipated, and at the time unexplained disappearance of critical, subpoenaed witnesses on what became the trial's last day."[323]

971–80. Professor Meltzer seems to me to have much the better of the argument, both on principle and authority. See, e.g., Felder v. Casey, 487 U.S. 131, 150–53 (1988) (invalidating inter alia as excessively burdensome in § 1983 context a nondiscriminatory state notice of claim statute). For a recent treatment of the undue burden test, see Catherine T. Struve, Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules, 103 Colum. L. Rev. 243, 264–76 (2003). On the issue of the extent to which the state courts are bound in future proceedings by a holding that the state procedural ground is inadequate, see Meltzer, supra, at 1150–52, 1202 n.370. Meltzer argues that the state courts are bound as a matter of federal common law. Id. at 1158–85. My inclination is to believe that in undue burden cases the basis for binding state courts is preemption.

319. 357 U.S. 449 (1958).

320. Id. at 454–55, 466; see Bush v. Gore, 531 U.S. 98, 114–15 (2000) (Rehnquist, C.J., concurring); id. at 139–40 (Ginsburg, J., dissenting). "Note the detailed examination of state law necessary to make such a determination." Hart & Wechsler, supra note 27, at 555.

321. 534 U.S. 362 (2002). The Court reversed the lower federal courts on the denial of habeas, which now effectively embodies the adequate nonfederal ground doctrine. For a lengthy analysis of *Kemna*, see Struve, supra note 318, at 268–72, 285–86, 299–300.

322. *Kemna*, 534 U.S. at 376.

323. Id. at 382. The Court added that to require perfect compliance in these circumstances would be "bizarre." The defendant's alibi witnesses had suddenly disappeared during the trial, and Lee offered to prove that they had left the courtroom because a court officer told them that their testimony would not be needed. "[I]nsistence on a written continuance application, supported by an affidavit, 'in the midst of trial upon the discovery that subpoenaed witnesses are suddenly absent, would be so bizarre as to inject an Alice-in-Wonderland quality into the proceedings.'" Id. at 383 (quoting Lee v. Kemna, 213 F.3d 1037, 1047 (8th Cir. 2000) (Bennett, J., dissenting)). The Court also emphasized that neither the trial judge nor the prosecutor had objected to the motion because it did not comply with the rules, and the Court characterized the state appellate court as having "injected" that issue into the case. Id. at 366.

Some of these decisions could be rationalized in "fair support" terms. But the scope of the Court's actual, careful examination of state law is far more consistent with the independent judgment rule.[324]

Another example, drawn from Eighth Amendment death penalty jurisprudence, is raised (but not closely examined) for consideration here. Here is how Hart and Wechsler invite us to think about some of the decisions:

> Under prevailing doctrine, once a state has opted among a variety of constitutionally permissible schemes for imposition of capital punishment, the Eighth Amendment can be seen as protecting a state-created liberty interest: state law defines when a capital sentence is permitted, and the federal Constitution protects against capital punishment imposed other than in accordance with the state's statutes.
>
> Although the Court has not described the problem in these terms, this approach may cast light on a number of difficult cases.[325]

Obviously, such a formulation of Eighth Amendment jurisprudence could require, inter alia, detailed examination of state law, when the claim was that there had been an impermissible departure from prior state law.[326]

CONCLUSION

I have argued that issues concerning the characterization of state law are for the Court's independent judgment pursuant to a federal standard, and that the Court also retains independent authority to review all questions of law application and of adjudicative fact, save those governed by the Due Process Clause and the Seventh Amendment.[327] Given that

---

324. In Street v. New York, 394 U.S. 576, 583 (1969), cited in Hart & Wechsler, supra note 27, at 543 & n.3, the Court acknowledged that there was uncertainty over whether it was exercising independent judgment on the issue of whether the federal claim had been adequately raised. Cf. Staub v. City of Baxley, 355 U.S. 313, 319–20 (1958) (rejecting a state court procedural bar on fair support grounds but, I believe, in fact relying on preemption grounds where the State rule invoked "arid ritual of meaningless form").

325. Hart & Wechsler, Fourth Edition, supra note 66, at 563 (citing Parker v. Dugger, 498 U.S. 308 (1991), as illustrative).

326. Other examples could be supplied but further detailed analysis would unduly extend this Article. For example, in *Gooding v. Wilson*, the Court said, "We have . . . made our own examination of the Georgia cases," and then concluded that those cases had not interpreted a Georgia statute consistently with the First Amendment. 405 U.S. 518, 524 (1972). Along a different dimension, it is also settled, for example, that the Court will determine for itself the content of the law of F_1 when the question is whether F_2 has satisfied its obligations to give full faith and credit to the law of F_1. Adam v. Saenger, 303 U.S. 59, 64 (1938). While the Court used deference language, it seemed quite clearly to be *Skidmore* deference, and it is unclear why the Supreme Court should accord any deference to F_2's exposition of F_1's law.

327. Earlier, I addressed the argument that the independent judgment rule with respect to issues of state law is no longer warranted, if it were ever warranted. See supra

authority, is it really important, as a matter of "judicial epistemology,"[328] whether the ultimate scope of the Court's review over state-court determinations of state law is framed in terms of independent judgment or fair support?[329] As Judge Posner recently put it: "[I]f there is a difference, is it one within the cognitive capacity of a reviewing court to discern? For we have remarked a number of times that there are limits to the fineness of the distinctions that judges are able to make."[330] Speaking in the context of the Contract Clause decisions, Herbert Wechsler asked, "Is it psychologically possible for the Supreme Court to do any more than ask itself whether it *clearly* would have judged the issue differently, on the available materials of decision, if it were the state's highest court?"[331]

From a litigant's point of view, the distinction between independent judgment and fair support review quite clearly matters. Like so many other distinctions (e.g., law application versus fact), the distinction is a fine one, and it operates only to identify points on a continuum.[332] Nonetheless, distinctions of this order are the only tools with which lawyers have to work when framing the all important question of the scope of appellate review. From the Court's point of view, however, the matter is far less clear. The concurring and dissenting opinions in *Bush v. Gore* illustrate that extensive review of state law can take place even under the fair support umbrella. *Demorest v. City Bank Farmers Trust Co.*,[333] the leading modern case articulating the "fair support" rule, is in fact a striking illustration of intensive review of state law. At issue was a retroactivity challenge to a New York statute allocating mortgage salvage proceeds between life tenants and remaindermen in wills or trusts. Rejecting a challenge that the statute impaired a vested right by changing the prior common law, the Court invoked the "fair support" standard. In the process however, the Court engaged in an extensive survey of New York law. The

---

Part III.A.3. As I said, I do not find the argument persuasive, but I will not retrace that discussion here.

328. Reynolds v. City of Chicago, 296 F.3d 524, 527 (7th Cir. 2002) (Posner, J.).

329. The question is especially troublesome because when the Court is convinced that the outcome of the case turns importantly on the content of state law, it can in fact undertake penetrating review of that law even under a fair support standard. Chief Justice Rehnquist's concurrence in *Bush v. Gore* is a potent illustration of that fact.

330. *Reynolds*, 296 F.3d at 527.

331. Henry M. Hart, Jr. & Herbert Wechsler, The Federal Courts and the Federal System 467 (1953) (emphasis added). Wechsler returned to this formulation in Wechsler, Appellate Jurisdiction, supra note 24, at 1052. I have underscored "clearly." Wechsler can of course be read to endorse the fair support rule. For me, however, "clearly" acknowledges that *Skidmore* deference is an appropriate component of an independent judgment rule. The quality of the state court opinion clearly matters, and any sensible application of the independent judgment rule must take that into account. Some significant perceptible countervailing pull from the state legal materials must exist before the Court should reject the well-considered conclusions of the state supreme court on the content of state law.

332. Hart & Wechsler, supra note 27, at 571–72; see also supra note 65; Monaghan, Fact, supra note 26, at 233.

333. 321 U.S. 36 (1944).

Court discussed the prior New York decisions, and quoted extensively from a report of the Executive Committee of the Surrogates' Association of the State of New York submitted to the legislature, and followed with an extensive quote from an opinion of a surrogate judge.[334] This discussion drew a one-paragraph protest from Justice Douglas, with whom Justice Black concurred.[335] Justice Douglas said that there was no claim that "state law has been manipulated in evasion of a federal constitutional right," and consequently, he could "see no possible claim to substantiality of any federal question."[336]

Moreover, even under the independent judgment rule deference has a place. A well-reasoned opinion of the highest state court is, in our constitutional order not to be lightly discarded. *Skidmore*, which I have used by analogy, is quite consistent with considerable deference.[337] In addition, as Judge Posner has observed, there is a basis in recent Supreme Court decisions for a belief that any distinction between *Skidmore* and *Chevron* has been elided.[338]

Nonetheless, the distinction between the two standards should matter to the Court. One need not wallow in "poststructuralism" to acknowledge the importance of "language and [of] language's underlying structures in shaping our understandings of reality and texts."[339] The Justices

---

334. Id. at 43–47. For a recent example of penetrating review under an ostensibly narrow standard of review (clear error), see Easley v. Cromartie, 532 U.S. 234 (2001), discussed in John Hart Ely, Confounded by *Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?, 56 U. Miami L. Rev. 489, 498 (2002) ("Indeed the very fact that the Court's decision was five-four suggests that the error, if any, was something short of clear, as does the fact that it took Justice Breyer eleven closely reasoned and fact-intensive pages to defend the Court's conclusion [reversing the three-judge district court].").

335. *Demorest*, 321 U.S. at 49 (Douglas, J., concurring).

336. Id. Earlier he wrote, "It is none of our business—whether we deem that interpretation to be reasonable or unreasonable, sound or erroneous." Id.

337. See supra text accompanying note 221.

338. In *Krzalic v. Republic Title Co.*, Judge Posner, over Judge Easterbrook's vigorous dissent on the point, said that Barnhart v. Walton, 535 U.S. 212, 222 (2002), "the Supreme Court's most recent decision interpreting *Chevron*, suggests a merger between *Chevron* deference and *Skidmore*'s." 314 F.3d 875, 879 (7th Cir. 2002). Judge Easterbrook stated, "Agencies' interpretive role stems from delegation of authority, not raw ambiguity." Id. at 883 (Easterbrook, J., concurring in part and concurring in the judgment). Recent decisions seem more concerned with whether the agency has given the matter consideration at the right level rather than with a search for delegated authority. In *Meyer v. Holley*, the Court, per Justice Breyer, said, "[W]e ordinarily defer to an administering agency's reasonable interpretation of a statute." 123 S. Ct. 824, 830 (2003). The Court cited both (and only) *Chevron* and *Skidmore* for this proposition. Justice Breyer was also the author of *Barnhart*. See also Boeing Co. v. United States, 123 S. Ct. 1099, 1107 (2003) (according deference to interpretive tax regulation); Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 123 S. Ct. 1017, 1026, 1028 (2003) (invoking *Chevron* to sustain an administrative regulation and *Skidmore* to sustain other "reasoned" administrative interpretation).

339. Peter C. Schanck, Understanding Postmodern Thought and Its Implications for Statutory Interpretation, 65 S. Cal. L. Rev. 2505, 2514 (1992).

should fully understand that there will be cases in which they can properly undertake an investigation of state law materials. The distinction posited between independent judgment and fair support review should condition the way they see the allowable scope of review. They are, to borrow from Justice Frankfurter's language in *Universal Camera Corp. v. NLRB*,[340] at least "mood" points that give the Court "an attitudinal perspective on [its] work."[341] Moreover, *Bush v. Gore* itself shows that the articulated standard can matter in a particular case. That regrettable by-product of the concurring opinion suggests either stupidity or cupidity on the part of the Florida Supreme Court majority. That effect would have been significantly minimized had the independent judgment rule been invoked, and the dissenting justices would have been forced to decide not whether the Florida Supreme Court's construction of the Florida election law was unreasonable, but whether it was basically correct.

One remaining question is whether any general criteria can be articulated that would make deference review the operative working-day premise of Supreme Court practice, reserving independent judgment for exceptional occasions.[342] On that point I am not sure. As matters currently stand, I would be inclined not to formulate criteria, but rather to call for a case-by-case analysis based upon the Court's "sense of the situation," with a strong orientation towards the fair or substantial support rule.[343]

There is, however, one factor that seems to me to justify independent review, and that is the perceived importance of the issue in light of our constitutional structure and tradition. Rule 10(c) of the Court's rules lists as a factor in a decision to grant review whether an inferior court "has decided an important question of federal law that has not been, but

---

340. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

341. Russell L. Weaver, The Emperor Has No Clothes: *Christensen, Mead* and Dual Deference Standards, 54 Admin. L. Rev. 173, 179 (2002). Writing in the context of *Chevron* and *Skidmore*, Professor Weaver argues that the decisions give insufficient guidance to the lower courts. That issue is of no significance here.

342. Hart & Wechsler, supra note 27, at 541, ask, "Is there any reason why the scope of review, on the question of the existence of an antecedent state-created entitlement, should not be the same in all the various cases discussed . . . ?" If the implicit suggestion is that the standard of review should vary with the constitutional clause involved, I am unpersuaded. In discussing guidelines for the Court's exercise of independent judgment with respect to law application and adjudicative fact, I emphasized such considerations as: (1) whether the area was one of evolving standards, and (2) whether there was any reason to distrust the other actors in the legal system. Monaghan, Fact, supra note 26, at 271–76; see also supra note 65. These factors are not readily transferable to this context. Distrust of the state court may have been an invisible component of the concurring opinion in *Bush v. Gore*. But that distrust could not be openly avowed. See supra text accompanying note 209. Moreover, any distrust of the Florida Supreme Court majority seems to be without foundation—wrong, perhaps, but no more than that. Furthermore, the distrust which I had in mind in *Constitutional Fact Review* was institutional in nature—for example, censorship boards and, in certain contexts, juries.

343. I would not ordinarily expect to see independent judgment with respect to antecedent state-law issues bearing upon federal statutory claims.

should be, settled by this Court . . . ."[344] "Importance," of course, cannot be reduced to some kind of self-evident, self-applying formula. It reflects intuitions and judgments, both conscious and unconscious, upon which all courts routinely act.[345] The "importance" criterion of Rule 10(c) should be extended to the scope of review as well as the decision to grant review. They seem closely linked. Tying independent judgment scrutiny to the structural importance of the issue is not open to a charge of unfairness to the litigants. They, after all, have no right to be in the Court, and they do not have any strong claim to a particular standard of review, so long as the Court is not acting arbitrarily or motivated by partisan concerns.

The exercise of discretion with respect to the standard of review might, however, be thought inconsistent with the grant of "judicial power" to the Supreme Court (and other Article III courts). While this is not the occasion to examine that question in great detail, it is surely a fair question. Over the course of time, however, the Court has fashioned limits on the exercise of the judicial power that it could have exercised. This is true for example with respect to the prudential components of the standing and ripeness doctrines and the various abstention doctrines.[346] Similar practices have also obtained in the Supreme Court, even with respect to its once ostensibly obligatory jurisdiction over "appeals" under 28 U.S.C. § 1257.[347] My general view is to treat this practice as far too embedded to be thought invalid. My particular difficulty, however, is the discretion that I posit may have a more ad hoc character to it than the prudential doctrines to which I have pointed.[348] Unlike Professor Bickel, however, I do not see the discretion posited as one driven by a distaste for certain substantive outcomes.[349]

If "structural importance" is a valid criterion, intense scrutiny of the state court's disposition of state law in *Bush v. Gore* seems to me fully warranted. I disagree with Justice Breyer's statement that "[o]f course, the selection of the President is of fundamental national importance. But

---

344. Sup. Ct. R. 10(c).

345. Examples are decisions to grant an expedited hearing or to enter extraordinary relief.

346. For a very recent example, see National Park Hospitality Ass'n v. Department of Interior, 123 S. Ct. 2026, 2032 (2003) (rejecting a suit for declaratory and equitable relief on prudential ripeness grounds). The Court has also treated its jurisdiction over certified questions under 28 U.S.C. § 1254 (2000) as essentially discretionary. Hart & Wechsler, supra note 27, at 1582.

347. Rescue Army v. Municipal Court, 331 U.S. 549 (1947), is the leading decision. The third edition of Hart & Wechsler contains the most comprehensive general account. See Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 735–48 (3d ed. 1988). The obligatory "appeals" jurisdiction was eliminated in 1988. See supra note 213.

348. Cf. John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2443 (2003) (stating that the absurdity doctrine cannot be defended as a background principle of construction because of its ad hoc character).

349. Alexander M. Bickel, The Least Dangerous Branch (2d ed. 1986).

that importance is political, not legal."[350] In our law-centered legal constitutional order,[351] I can think of few legal issues of more importance than whether the president was lawfully elected.[352] In a system in which election depends on electoral, not popular, votes, whether Florida conducted its election in accordance with the strictures of Article II is an issue in which all Americans have an interest. That issue should be finally decided by the highest national court.[353]

---

350. Bush v. Gore, 531 U.S. 98, 153 (2000) (Breyer, J., dissenting). Immediately following comes a mystifying sentence: "And this Court should resist the temptation *unnecessarily* to resolve *tangential* legal disputes, where doing so threatens to determine the outcome of the election." Id. (emphasis added).

351. This assumes with the Court and the concurrence that the validity of a presidential election presents a judicially cognizable constitutional issue. There are, as I have noted, those who think that the specific issue of presidential elections under Article II, Section 1, Clause 2 of the Constitution was left to Congress to determine. That is not my inclination, and it would require overruling McPherson v. Blacker, 146 U.S. 1 (1892), see supra note 46, but that would be another consideration of that topic. In any event, I do not see how one would conclude that Congress would determine whether or not the Equal Protection Clause had been violated, as the per curiam opinion holds.

352. "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." Burroughs v. United States, 290 U.S. 534, 545 (1934).

353. Contrast Carrington & Powell, supra note 5, at 11, who argue that it would be a valuable civics lesson if the Court had declined jurisdiction and thereby dramatically demonstrated to the American public the limited nature of the Court's job. I disagree. A valuable civics lesson *was* taught: If presidential elections are governed by legal rules, the highest court must ensure compliance with those rules.